THE UNITE REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(IRINGA DISTRICT REGISTRY)

AT IRINGA

DC. CIVIL APPEAL NO. 05 OF 2021

(Originating from District Court of Mafinga in

Civil Case No. 02 of 2019)

FIDELIS KIGODI ..... APPELLANT

VERSUS

THE BOARD OF THE REGISTERED TRUSTEES

OF ROMAN CATHOLIC USOKAMI PARISH

IRINGA DIOCESE..... RESPONDENT

4/11 &07/12/2021

JUDGMENT

MATOGOLO, J.

In the District Court of Mufindi the appellant Fidelis Kigodi sued the respondent, the Board of Trustees of Roman Catholic Parish Iringa Diocese for payment of Tshs. 8,00,000/= being value of bricks appellant was to make for the respondent. Tshs 2,000,000/= compensation for disturbance, compensation for general damages and costs of the suit.

The suit was dismissed for want of merit. Dissatisfied with the decision, the appellant has come to this court where he filed memorandum of appeal of four grounds as follows;-

1. That, the trial magistrate erred in law and facts by ordering return of Tshs 2,100,000/= to respondent while the contract was partly performed by the appellant.
2. That, the trial and appellate Court erred both in law and fact by not taking into consideration the evidence adduced by the appellant which was heavier than that of the respondent as a result reached at unfair decision.
3. That, the trial magistrate erred both in law and facts by deciding in favour of the respondent while the respondent did not prove her case on the standard required of balance of probability.
4. That, the trial judgment was not a judgment at all because it contained illegalities.

The appellant prayed for the trial court decision to be set aside and/ or decree quashed and the appeal be allowed with costs.

Before this court the parties were represented. Mr. Alfred kingwe learned advocate and Sr. Chalamila learned advocate appeared for the respondent. The appeal was argued by written submissions.

Mr. Kingwe argued grounds of appeal 2 and 3 together in which he submitted that it is settled law that parties are bound by the agreements they freely entered into being the cardinal principle of law of contract that there should be a sanctity of the contract as

lucidly stated in **ABUALLY ALIBHAI AZIZ VS. BHATIA BROTHERS LTD [2000] TLR 288.**

He said the contract that the parties entered had all attributes of a valid contract. It was not prohibited by the public policy and it is on record that the respondent was not complaining about her consent to the agreement being obtained by coercion, undue influence, fraud or misrepresentation in order to make it voidable in terms of the provisions section 19(1) of the Law of Contract, Cap. 345 R.E. 2019. He said it should also be noted that the respondent did not complain about the performance of the appellant regarding the agreement of manufacturing bricks. As per agreement the records are silent on whether law of performance lead to the agreement being void or end of contract, also what are the standard which were set by the parties so as to be used as the reference to say that bricks were of the lower standard required. Mr. Kingwe submitted that it is not in dispute that the appellant and the respondent entered into agreement of making 200,000/- bricks for consideration of Tshs. 8,000,000/= which were for construction of school for parish and on 20th day of August, 2018 the appellant made about 160,000/= bricks and required firewood from the respondent. It is very unfortunate that while the appellant proceedings with the remaining bricks that is 40,000 the respondent stopped him with no colour of justification Mr. Kingwe argued that the appellant performed his part as they agreed as from the beginning the

respondent has seen the bricks as a result she agreed to issue the firewood to bake the bricks. He said the trial magistrate erred to order the return of Tshs. 2,100,000/- to the respondent while the contract was partly performed by the appellant. Thus the first issue raised by the court is answered in the affirmative that the parties had entered into an agreement of making bricks and the appellant up to 20th day of August, 2018 made 160,00 bricks thus there is no doubt that the contract was partly performed by the appellant.

With regard to the second and third grounds of appeal, Mr. Kingwe submitted that the trial magistrate erred in law and fact in deciding the matter in favaour of the respondent without proof on the balance of probability. The respondent only adduced the evidence to the fact that the bricks were below standard required without producing any piece of evidence to justify her argument which set of standard is required and set by the partied.

He said the trial judgment is based on imagination and not reasoned judgment which involve evaluation of facts and issues because the second issue raised by the trial court was not determined on legal basis as required by the law.

Regarding the last ground of appeal Mr. Kingwe submitted that the judgment was not a judgment at all simply because it contained illegalities. He said it is in the court records that the parties entered into agreement of manufacturing 200,000 bricks and the appellant made 160,000 bricks and requested firewood from the respondent as

shown at page 3 of the judgment. But the trial magistrate only mentioned the inconsistencies and discrepancies in plaintiff's evidence as per Exhibit DE2, the appellant demanded that he entered into a contract of making 200,000 bricks instead of 100,000 bricks adduced by DW1. He said it was not the duty of the appellant to agree with anything that the respondent allege or narrates. Mr. Kingwe was of that view because if you pass through the trial court records you find that what the trial magistrate did is to insist the appellant to prove the matter alleged by the respondent. He insisted that the trial judgment contained illegalities because no member of the Board of the Registered Trustees of Roman Catholic Usokami Parish Iringa Diocese who came and attested before the court but the court decided in favour of the respondent, as the law requires Board members of the Registered Trustees to appear before the court and give evidence to prove or disprove the allegation. But the court record is silent on the member of the Board. Only one person known as Fr. Francisco appeared who is not a member of the Board of Trustees as per court record. He said the trial magistrate was wrong to impose the liability of proof on the appellant only and not to look on the testimony of the parties as required by law.

Mr. Kingwe went on submitting that, the appellant pleaded that he entered into agreement of manufacturing bricks with the respondent on 25/06/2018 up to 20th days of August, 2018, the appellant managed to make 160,000 bricks out of 200,000 bricks the

fact of which is not disputed by the respondent. He said it is unfair to rule out that the appellant failed to cross-examine the respondent on certain matters while the respondent did the same. Mr. Kingwe learned advocate prayed for the trial court decision be quashed and set aside and an appeal be allowed in its entirety with costs.

On her part Sr. Chalamila submitted that the submission by the appellant in support of the appeal is baseless and devoid of merit.

She disputed the argument by the appellant that the contract was partly performed for the trial magistrate to be faulted to order payment of Tshs 2,100,000/= Sr. Chalamila viewed the decision of the trial court as sound one. She said the record, exhibit D1 in particular which was tendered and admitted without objection reveals that, the amount of Tshs 2,100,000/= was collected by the appellant as an advance for purchasing of the bricks which were not supplied to the Respondent as undertaken by the appellant.

The learned advocate submitted also that, it is from the records that the appellant did not dispute the claims by the respondent that he produced the bricks which were below standard and which upon the respondent's rejection, the appellant under took to produce other bricks of the acceptable standard, the appellant did not dispute nor discredit by cross-examination, by necessary implication he accepted and admitted the evidence as correct. To that she referred to this court the case of **PAULO ANTHONY VS. THE REPUBLIC**, Criminal Appeal No. 189 of 2014 (unreported).

She said the undisputed fact that, he collected the monies in different occasions as per annexeture D1 and failed to deliver the bricks to the respondent, the trial magistrate was correct to order refund of the collected,monies.

Sr. Chalamila distinguished the case of **ABUALLY ALIBHAI AZIZ** (supra) cited by the appellant as irrelevant in the circumstances of the present suit.

She said the appellant did not perform the contract as he tries to argue. The learned advocate submitted further that the argument by the appellant that he contracted with the respondent for production of 200,000 bricks at the consideration of Tshs. 8,000,000/= and produced 160,000, only 40,000/= bricks remained as contrary to what is contained on the record, the appellant did not give any evidence to substantiate his claim. She said what has been submitted on appeal is strange and afterthought. She also submitted that the appellant alleged from Exhibit D2 tendered by the respondent that he contracted with the respondent for making 160,000 bricks not 200,000 thus there is contradiction and uncertainty in his averment. She maintained that the appellant collected the monies but he failed to deliver the products.

With regard to the second and third grounds of appeal Sr. Chalamila submitted that they dispute the allegations that, the respondent failed to prove on balance of probabilities the demand for proof on the standard of bricks at this stage is a misconception of its

own kind. She said the trial magistrate at page 4 made a finding upon analysis of evidence that there were clear admission by the appellant that the bricks were of below standard, for failure to cross-examine the defence witness. She submitted further that the appellant did not dispute that all bricks were broken upon offloading the same, what other evidence is needed by the appellant at this stage, she questioned.

As to the third ground, it is the submission by Sr. Chalamila that, the judgment of the trial magistrate does not contain any illegality, the reasoning, finding and observation made by the trial magistrate was proper and correct. She said the trial magistrate reasoning is based on pleadings, exhibits which were tendered in court, all her findings were within the contents of the records, needless to say there are serious contradictions in respect of the appellant's claims, thus on standard set by the law in civil suit that is the balance of probabilities, the plaintiff failed to prove his claim and admitted to be indebted.

On the appellant's complaints about non-appearance of the trustees in court, Sr. chalamila submitted that this is an afterthought on reasons that the same was not an issue at the trial, it was not raised at the hearing, worse of it, it is not contained in the grounds of appeal as a point which he needed the attention of this court to determine on appeal, it remains to be by the way of argument which cannot be dealt with.

Sr. Chalamila submitted further that it sounds absurd that the appellant on one hand alleged to have been entered into contract with Fr. Francisco of Usokami Parish, on the other hand he denies his capacity to defend the matter yet is the one who effected summons to Fr. Francisco and there is no report on records as to why he did not serve the summons to any of the Trustees of Iringa Diocese.

Sr. Chalamila argued that, an appeal on new things which were not canvassed at the trial cannot be entertained as it was held in the case of **HOTEL TRAVERTINE LTD AND 2 OTHERS VS NBC [2006] TLR 133.**

The learned counsel prayed for the appeal to be dismissed with costs for want of merit.

Having read the opposing submissions from the learned counsel of both sides, the grounds of appeal and the trial court proceedings, the issue for determination here is whether this appeal has merit.

As pointed out at the beginning that it is the appellant who had sued the respondent in the District Court of Mufindi but the suit was dismissed for lack of merit. Instead the appellant was ordered to refund to the respondent (defendant) the sum of Tshs. 2,100,000/= which he received as advance payment for making the bricks.

The appellant was aggrieved he appealed to this court and put forward four grounds as listed above. However I should point out from the outset that in his submission in support of the appeal, Mr.

Kingwe learned advocate has submitted on the issue of failure by the Board of Trustees members to testify at the trial the act which according to him rendered the trial magistrate judgment illegal. In her reply submission Sr. Chalamila learned counsel for the respondent contended that this is a new issue not canvassed at the trial and thus an afterthought. I have carefully passed through the trial court proceedings. This point never featured at the trial as the record is silent on this. This issue is therefore new, not raised before at the trial, the same was also not adjudicated by the trial court. It is trite law that the issue which was not raised at the trial and thus not adjudicated cannot be raised at an appeal stage as it was decided by the Court of Appeal of Tanzania in the case of **HOTEL TRAVERTINE LTD AND 2 OTHERS** (supra) in which it was held:-

> *"(ii) Acceptance by conduct is the matter that could not be raised on appeal as it was not pleaded or argued in the High Court".*

As that issue was not raised at the trial or was it adjudicated by the trial court, the same cannot be raised at an appeal stage.

With regard to the first grounds the appellant's argument is that the trial magistrate erred in law and facts by ordering return of Tshs. 2,100,000/= to the respondent as the appellant has performed part of the contract. Among the agreed 200,000 bricks the appellant had

manufactured 160,000 and only 40,000 remained so it was not fair for the trial magistrate to order the appellant to refund Tshs. 2,100,000/=.

The respondent on her part has argued that it is from court record which is not disputed by the appellant that the sum of Tshs. 2,100,000/= was collected by the appellant as advance payment for the purchase of the bricks however the said bricks were not supplied to the Respondent.

I have gone through the trial court record, there is no dispute that the parties entered into a contract whereas the appellant covenanted to supply burnt bricks to the respondent although the amount is not certain as appellant claimed they agreed to mould and burnt 200,000 bricks on the other hand the respondent said the contract was for moulding and burning only 100,000/=. However what appears to be cause of the problem is the quality of bricks which appellant prepared for the respondent. The respondent through DW1 testified to the effect that, after he was informed that the brick were ready he sent a motor vehicle to carry them, but upon offloading them they all got broken. The appellant was informed accordingly, and according to DW1, he agreed to replace the bricks but he did not do so despite the fact that, already he was paid advance payment of Tshs. 2,100,000/=.

Mr. Kingwe argument appears to be awkward one. He argued that, the appellant has performed part of the contract. He went further by arguing that there was no description given. But this fact is not supported by the court records and the evidence given by the parties. It is on record that the appellant was told to produce bricks of quality standard for the

construction of the school. There is also evidence that the appellant has been working with the respondent, Catholic Church at Usokami Parish. Even the appellant himself has clearly stated so in his evidence. It appears the appellant is an experienced person in moulding and baking bricks that is why the respondent trusted him by even issuing to him Tshs. 2,100,000 as advance payment. However the appellant was unable to meet the quality standard required by the respondent. It is inconceivable to hear from the learned counsel for the appellant that the appellant has partly performed the contract by burning 160,000 bricks. But as I said earlier appellant did not dispute the fact that, the first trip of bricks loaded from the place where were moulded and burnt at the time of offloading they all get broken. It is not expected for the respondent to continue accepting such bricks of lower quality which were going to be used in construction of school. It is trite law that when it comes to supply of any good or material in fulfillment of entered contract the good must be of merchantable quality. This is provided for under Section 16(b) of the sale of goods act Cap. 214 R.E. 2002. The same provides:-

> *"16(b) where goods are bought by description from a seller who deals in goods of that description (whether he be a manufacturer or not) there is an implied condition the goods shall be of merchantable quality"*

But also Section 36(1) provides:-

"36(1) where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract".

The supply of bricks made by the appellant did not conform to what the parties had agreed. The respondent was entitled to rescind the contract and the trial court was justified to order for the advanced sum of Tshs. 2,100,000/= to be returned to the respondent.

In the second ground the appellant is faulting both trial and appellate court by not taking into consideration that, evidence adduced by the appellant, first of all it is not correct for the appellant to allege that, "the trial court and appellant court" did not consider his evidence. This ground is misconceived as the District Court of Mufindi is the trial court and the appellant's appeal lied to this court and the complaint in the third ground is that the trial court erred by deciding in favour of the respondent while the respondent did not prove her case on the standard required.

Sr. Chalamila learned counsel for the respondent had correctly submitted that there has been contradiction by the appellant, firstly he claimed that their contract involved manufacturing of 200,000 bricks. But in his evidence he stated that he contracted to make 160,000 bricks and not 200,000 this is also clear from the appellant's demand notice issued to the

This has its foundation under Section 110 of the Law of Evidence Act which provides:-

> *"110(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts the existence of facts which he asserts must prove that those facts exist.*
>
> *(2) when a person is bound to prove the existence of any fact. It is said that the burden of proof lies on that person".*

S. 111 provides:-

> *The burden of proof in a suit proceedings lies on that person who would fail if no evidence at all were given on either side".*

But this burden of proof never shift to the adverse party as it was held in the case of **PAULINA SAMSON NDAWANYA vs. THERESIA THOMAS MADAHA,** Civil Appeal No. 45 of 2017 CAT (unreported).

The above cited provisions and decided cases emphasize on the legal requirement as to who has the burden of proof. However the present appellant has failed to discharge that burden that is why the suit he filed against the respondent was dismissed. In actual fact I do not see any merit

in this appeal as I have demonstrated above, even the decided cases cited by the appellant are irrelevant and do not support him.

In upshot, this appeal fails, the same is dismissed with costs.

DATED at **IRINGA,** this 7th day of December, 2021.

F. N. MATOGOLO

JUDGE

07/12/2021

Date: 07/12/2021

Coram: Hon. F. N. Matogolo – Judge

Appellant: Mr. Kingwe – Advocate

Respondent: Absent

C/C: Grace

Mr. Kingwe – Advocate:

My Lord I am appearing for the appellant. I am also holding brief for Sr. Chalamila advocate for the Respondent. My Lord the case is for judgment we are ready.

COURT:

Judgment delivered

F. N. MATOGOLO

JUDGE

07/12/2021