

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**BUKOBA DISTRICT REGISTRY**

**AT BUKOBA**

**(PC) CIVIL APPEAL NO. 04 OF 2021**

*(Arising from Civil Appeal No. 25 of 2018 in the District Court of Bukoba at Bukoba and Originating from Civil Case No. 97 of 2018 in the Bukoba Urban Primary Court)*

**RAMADHANI SELEMAN NURU----- APPELLANT**

**VERSUS**

**GODFREY PROTASE----- RESPONDENT**

**JUDGMENT**

**Date of Last Order: 08/10/2021**

**Date of Judgment: 11/11/2021**

**Hon. A. E. Mwipopo, J.**

This appeal originate from the decision of the Bukoba Urban Primary Court in Civil Case No. 97 of 2018 dated 16<sup>th</sup> April, 2018 where the Court ordered Ramadhani Seleman Nuru, the Appellant herein, to pay shillings 1,200,000/= to the Respondent namely Godfrey Protase being compensation for failure to deliver 3 bundles of corrugated iron sheets after receiving its payment from the Respondent. The Appellant was not satisfied with the decision and filed Civil Appeal No. 25 of 2018 in the Bukoba District Court. The District Court dismissed

the appeal on 29<sup>th</sup> November, 2018 for want of merits. The Appellant was aggrieved by the decision of the District Court and filed the present appeal.

The appeal is made by Petition of Appeal which contains 3 grounds of appeal. The said grounds of appeal are as follows hereunder:-

- 1. That, like the trial Court the 1<sup>st</sup> Appellate Court grossly erred in facts and law in awarding the payment of the pleaded sum of Tshs. 1,200,000/= which was contrary to the received amount to the tune of Tshs. 780,000/= meant for purchase of the corrugated iron sheets.*
- 2. That, the learned presiding Magistrate of the trial Court delivered the judgment in absence of Assessors' opinions and fatally occasioned the material errors to the prejudice of the justice against the Appellant.*
- 3. That, the Lower Courtstotally misdirected themselves by their failure of taking into account the defense testimonies to the effects of the reimbursed amount.*

Both parties appeared in person, unrepresented. The hearing of the appeal proceeded orally.

The Appellant submitted that the Primary Court erred in its decision as the amount which was paid for buying bundles of corrugated Iron sheets was 780,000/= Shilling as each of the bundle was sold at 260,000/= Shillings. It is not true that the claims was for 1,200,000/= Shillings as the Respondent informed the trial court. The amount is found in the receipt which was tendered

as exhibit. This holding that the cost of the corrugate iron was shillings 1,200,000/= has no proof whatsoever.

The Appellant stated on the second ground that the Assessors'in the Primary Court did not provide their opinion. For that reason, the whole proceeding was a nullity,

In his last ground, the Appellant argued thatthe court did not give him time to provide evidence of the amount he had already reimbursedthe Respondent. He said that he paid 280,000/= shillings to the Respondent and the amount which remains the Respondent took two bundles of corrugate iron sheet as it was proved by testimony of the Village Executive Officer. The Respondent took the bundles of corrugated iron on 07.05.2017 in the presence of Ward Executive Officer and Police Officer Rashid. The trial Magistrate was not ready to do justice as he did not give him chance to call these witnesses.

The Respondent argued in reply that on 04<sup>th</sup> May, 2017 he paid the Appellant shillings 780,000/= for 3 bundles of corrugated Iron sheet of 30 gauge and he was given receipt on promise that the corrugated Iron sheets will be delivered on the next date.The Appellant signed on the back of the receipt showing that he have not taken the corrugated iron sheet and the receipt was tendered as exhibit before the Primary Court. The Appellant never delivered the said corrugatediron sheets. The Respondent said that he handled shillings

780,000/= to the Appellant as a purchase price but at the time he instituted the case the price off corrugated from sheet bundle has increased from 260,000/= shillings to shilling 320,000/=. The Appellant admitted in his testimony before the Primary Court for the increase in price. He added that he prayed to be compensated with actual cost for corrugated Iron sheets and damages for the disturbances. The Primary Court ordered the Appellant to pay him a total of shillings 1,200,000/=:, where shillings 960,000/= were for the 3 bundles of corrugated Iron and 240,000/= shillings for damages. The Appellant said that the Respondent failed to prove in his defense that he refunded him. The Appellant has always been denied to receive the payments, but today in his submission he has admitted to receive from Respondent shillings 780,000/= as payment for purchasing bundles of corrugated iron sheets. The Respondent prayed for the Appeal be dismissed with cost and interest.

In rejoinder, the Appellant retaliated his submission in chief.

From submissions, the issue for determination is whether or not the appeal has merits.

I will start with determination of the Appellant's 2<sup>nd</sup> ground of appeal which is questioning the jurisdiction of the trial Primary Court which its judgment did not contain the Assessors opinion. The Appellant alleged that this makes the whole proceedings before the trial Court be a nullity. It is a settled principle that

Assessors are members of the Primary Court and are required to participate in both the decision making process and finally sign the judgment of the court. The relevant provision of the law which provides for the part prayed by the Assessors in the Primary Court proceedings is section 7 of the Magistrates' Courts Act, Cap. 11 RE 2002 and Rule 3 of the Magistrates' Courts (Primary Courts) (Judgment of Court) Rules, G.N. No 2 of 1988. Section 7 of the Act reads as follows:

*"77 (1) In every proceeding in the primary court, including a finding, the court shall sit with not less than two assessors.*

*(2) All matters in the primary court including a finding in any issue, the question of adjourning the hearing, an application for bail, a question of guilt or innocence of any accused person, the determination of sentence, the assessment of any monetary award and all questions and issues whatsoever shall, in the event of a difference between a magistrate and the assessors or any of them, be decided by the votes of the majority of the magistrates and assessors present and, in the event of an equality of votes the magistrate shall have the casting vote in addition to his deliberative vote.*

*(3) In any proceeding in any other magistrates' court in which any rule of customary or Islamic law is in issue or relevant the court may, and when directed by an appropriate judicial authority shall sit with an assessor or assessors; and every such assessor shall be required, before judgment, to give his opinion as to all questions relating to customary or Islamic law in issue in, or relevant to, the*

*proceeding; save that in determining the proceeding the court shall not be bound to conform with the opinion of the assessors."*

From Section 7 (1) and (2) of the Magistrates' Courts Act cited above, the Primary Court is obliged to sit with not less than two assessors in any matter before it. ~~The Assessors are part of the Primary Court together with the Magistrate.~~ Under section 7(1) and (2) of the Act, there is no requirement for the assessors to give their opinions before the magistrate writes the judgment.

The Magistrates' Courts (Primary Courts) (Judgment of Court) Rules, G.N. No 2 of 1988 provides how the decision of Primary Court is reached. It provides in rule 3 for the duty of the Magistrates to consult with the Assessors before the decision is reached. The rule reads as follows:-

"3. (1) *Where in any proceedings the court has heard all the evidence or matters pertaining to the issue to be determined by the court, the magistrate shall proceed to consult with the assessors present, with the view of reaching a decision of the court.*

(2) *If all the members of the court agree on one decision, the magistrate shall proceed to record the decision or judgment of the court which shall be signed by all the members.*

(3) *For the avoidance of doubt a magistrate shall not, in lieu of or in addition to, the consultations referred to in sub-rule (1) of this Rule, been title d to sum up to the other members of the court."*

The above cited rules does not demand the assessors to give their

opinions on an issue before the court. Under sub - rule (1) all members of the court are required to participate in the decision making process of the court after hearing the evidence from the parties is completed. The sub-rule (1) makes it mandatory for the Magistrate to consult with Assessors before the decision is reached. Assessors being members of the Primary Court are equal with the magistrate. The decision is reached by members of the court to meet and deliberate on the issues before them. In such a case, the magistrate will write down the decision, which will then be signed by all members of the court. According to Rule 3(2), where there is no dissenting opinion among members of the court, the magistrate shall write the judgment which shall be signed by all members. Where the judgment is signed by the magistrate and assessors, it means the members agreed on the decision written by the magistrate.

In the case of **Adelaida Kemilembe Masilingi V. Advella K. Rugalabamu**, (PC) Civil Appeal No. 16 OF 2019, High Court, Bukoba Registry at Bukoba, (Unreported), Hon. Kilekamajenga, J., while discussing the issue of failure to record assessors' opinions held that, I quote:-

*"In my view, where there is no dissenting opinion, the magistrate does not need to state the opinion of each assessor because all members of the court agreed on one decision."*

The Court of Appeal of Tanzania when confronted with the issue in the case **Neli Manase Foya V. Damian Mlinga**, [2005] T.L.R. 167 held that:-

*"As for the Assessors opinions, it is nowadays not necessary to write Assessors opinion provided they sign the judgment of the Court to certify that they agree with it."*

In the case at hand, the record of the Primary Court Proceedings shows that the Assessors were of opinion that the Respondent be compensated for his money. Reading the judgment of the Primary Court it reflects the opinion of the Assessors that the Respondent has to be paid by the Appellant. The content of the judgment shows that the decision was reached in consensus by the Magistrate and Assessors. Thus, I find this ground has no merits.

I proceed to determine the Appellant's third ground of appeal that the lower Courts totally misdirected themselves by failing to taking into account defense testimonies to the effects of the reimbursed amount. In support of this ground, the Appellant submitted that he paid 280,000/= shillings to the Respondent and the amount which remains the Respondent took two bundles of corrugate iron sheets as it was proved by testimony of the Village Executive Officer. The Respondent took the bundles of corrugated iron on 07<sup>th</sup> May, 2017 in the presence of Ward Executive Officer and Police Officer Rashid. The trial Magistrate was not ready to do justice as he did not give him chance to call these witnesses.

Looking at the Primary Court judgment, the Court considered the defense testimony. This can be seen in page 3 of the typed judgment where the Court



find that there is no proof that the Respondent received shillings 255,000/= as reimbursement from the Appellant. The Court said that the testimony of Ward Executive Officer - SU2 is hearsay and is not admitted and the witness does not state the amount which was received by the Respondent. On the allegation that he was denied chance to call his witnesses to prove the reimbursement, the record proceedings of the Primary Court shows that on 4<sup>th</sup> April, 2018 after SU2 has completed to testify the Appellant informed the Court that he will bring another witness. The case was adjourned to 11<sup>th</sup> April, 2018. On the said date, the record shows that the Appellant closed his case. Thus, there is nothing to prove that he was denied to call another witness.

Further, the District Court considered Appellants' defense in its judgment as seen in page 4 of the typed judgment. The Appellant submitted before the District Court that he have already paid shillings 750,000/= to the Respondent and that he is owed only shillings 30,000/=. The Court did find that the Appellant's evidence was insufficient for the reason that SU2 did not state the amount the Appellant reimbursed the Respondent and there is no evidence to support that allegation. The Court also observed that the Appellant is not telling the truth since he alleged that the Respondent paid for the corrugated iron sheet on 04<sup>th</sup> May, 2017 and agreed to take the same on 20<sup>th</sup> May, 2018 which is more

than one year later. Thus, the District Court considered Appellant's evidence in its judgment and find that it was not sufficient.

After I have thoroughly read the evidence in record, the proceedings and judgment of the lower Court, I have observed that the evidence of the Appellant before the trial Primary Court and his submission before the District Court and even before this Court differs. In the Primary Court, the Appellant stated that on 13<sup>th</sup> March, 2018 he reimbursed shillings 255,000/= to the Respondent and that he is indebted to the Respondent for shillings 5,000/= and two bundles only which he will give it to him on 20<sup>th</sup> May, 2018. In his submission before the District Court he stated that he have already paid shillings 750,000/= to the Respondent and that he is owed only shillings 30,000/=. In this Court he submitted that he have already reimbursed the Respondent. He said that he paid 280,000/= shillings to the Respondent and the amount which remains the Respondent took two bundles of corrugate iron sheets on 07<sup>th</sup> May, 2017 as it was proved by testimony of the Village Executive Officer. That the Respondent took the bundles of corrugated iron in the presence of Ward Executive Officer and Police Officer Rashid.

However, the evidence of Ward Executive Officer – SU2 differs with his submission. SU2 stated that in March, 2018 he called the Respondent and asked him about the bundles he owe the Appellant and the Respondent informed him

that he took some money from the Appellant and he still owe the Appellant two bundles of corrugated iron sheet and some money. This evidence of SU2 contradict Appellant testimony that he reimbursed the Respondent with money and bundles of iron sheets in his presence. It is clear that the Appellant is not telling the truth. For that reason, I find that trial Court and the District Court considered his defense on reimbursement and properly find that the same is insufficient. Thus, this ground also has no merits.

The Appellant's remaining ground of appeal is ground No. 1 which states that the trial Court and the 1st Appellate Court grossly erred to award the payment of the pleaded sum of Tshs. 1,200,000/= which was contrary to the received amount to the tune of Tshs. 780,000/= meant for purchase of the corrugated iron sheets. There is no dispute that the Appellant received shillings 780,000/= from the Respondent being purchase price for 3 bundles of corrugated iron sheets on 04<sup>th</sup> May, 2017. The Respondent prayed to the Primary Court to be paid a sum of shillings 1,200,000/= being market price for 3 bundles of corrugated iron sheets and damages for disturbance. In his testimony which was not disputed, the Respondent testified that the price of the bundle of corrugated iron sheet has increased from 260,000/= shillings to shilling 320,000/=. The Respondent prayed for the trial Court to compensate him with actual cost of 3 bundles of corrugated Iron sheets which is shillings 960,000/=

and 240,000/= shillings for damages. The same was granted by the trial Court for the reason that the Appellant have taken the money of the Respondent since 2017 up to that time of judgment where the price of iron sheet has escalated and for disturbance.

The District Court upheld the amount awarded by the Trial Court for the reason the market value of the bundle of iron sheets has soared and the Respondent has been travelling to make follow up where he incurred cost. I agree with both reasoning of the trial Court and District Court and I have nothing more to add as it speaks for itself. The Respondent who paid for 3 bundles of iron sheet in May, 2017 has not received it from the Appellant until to date and the price of the same has increased. Also, the Respondent has been making follow up to be given his right since 2017 up to the present. It is so sad that the Respondent is still fighting to get his money from the Respondent after he took from him in 2017. Thus, this ground also has no merits.

Therefore, I find that the appeal has no merits in totality and I hereby dismiss it with cost.



A handwritten signature in blue ink, appearing to read "A.E. Mwiporo", written over a horizontal line.

**A.E. MWIPOPO**

**JUDGE**

**11/11/2021**

Date: 11/11/2021

Coram: Hon. J.M. Minde, DR

Appellant: Present

Respondent: Absent

B/C: Lilian Paul

**Court:** This matter is set for judgment today after the trial Judge compose his judgment.

**Order:** I deliver the judgment in the presence of Appellant and in the absence of Respondent.



  
Sgd: J.M. Minde, DR

11/11/2021