

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

PC. CIVIL APPEAL NO. 12 OF 2021

(From the District Court of Mbarali, at Rujewa in Civil Appeal No. 05 of 2021, Originated in the Primary Court of Mbarali District at Rujewa in Civil Case No. 7 of 2021).

RAMADHANI GALAHENGA.....APPELLANT

VERSUS

VUMILIA MLOWE..... RESPONDENT

JUDGMENT

Date of last order: 20.10.2021

Date of Ruling: 17.12.2021

Ebrahim, J.

This is a second appeal. The appellant RAMADHANI GALAHENGA was sued by the respondent VUMILIA MLOWE for compensation of Tanzania shillings (Tshs.) 1,020,000/= being specific damage incurred by the respondent for misrepresentation made by the appellant. The matter started in the Primary Court of Mbarali District at Rujewa. The Primary court decided in favour of the respondent. The decision did not amuse the appellant, he

unsuccessfully appealed to the District Court of Mbarali. He is now appealing before this court. He preferred three grounds of appeal as follows:

1. That the appellate court erred in law and facts when failed to properly analyze the evidence adduced by the parties when making the decision.
2. That the appellate court erred in law and facts when entertained a Criminal Case as a Civil case.
3. That the appellate court erred in law and facts when it ordered the Appellant to pay the respondent in the absence of the contract between the parties.

Owing to those grounds the appellant prayed for this court to allow the appeal with costs.

During hearing of the appeal both parties appeared in person, unrepresented. They prayed to argue the appeal by way of written submissions and the court granted the prayer. Their submissions were duly filed.

In essence the appellant submitted that, the respondent failed to prove at the required standard that the appellant sold to her

different paddy from those they agreed. He contended that since the appellant started the case by reporting to the police station, the same was supposed to be instituted as a criminal case since civil cases are instituted directly in the Primary Court. He further contended that there was no contract which exhibited that the two entered into the agreement.

In turn, the respondent argued that she proved the case in the balance of probability as required by the law and the first appellate court properly re-evaluated the same. As to the 2nd ground of appeal, she argued that the same was neither raised in the trial court nor in the first appellate court hence, this court cannot consider it in this second appeal. She cited the case of **Ally Hussen v. Republic**, Criminal Appeal No. 293 of 2018 Court of Appeal of Tanzania at, Dar es Salaam (unreported). As to the 3rd ground of appeal the respondent argued that the evidence she adduced and that adduced by her witness was sufficient to prove the claim. She thus urged this court to dismiss the appeal for lack of merits with costs.

Having keenly considered the submissions by the parties, and having scanned the record of both lower courts, I hastily concur

with the respondent that the 2nd ground of appeal is new. It is a matter of general principle that an appellate court cannot allow matters not taken or pleaded in the court below, to be raised on appeal; see **Gandy v. Gaspar Air Chatters Ltd (1956) 23 EACA 139**, **James Ames Funke Gwagilo v. Attorney General**, Civil Appeal No. 76 of 2001 CAT, **Hotel Travertine Limited and Others v. National Bank of Commerce Limited [2006] TLR**, to cite a few. I will therefore not consider the 2nd ground of appeal since it was neither the issue before the Primary Court nor the ground of appeal in the District Court.

The remaining two grounds i.e the 1st and 3rd ground are essentially revolving to one complaint that the District Court did not properly re-evaluate the evidence of the trial court. However, it is common ground that both lower courts made similar findings that the appellant by misrepresentation sold the different paddy to the respondent from the sample of the rice he showed her. It is trite law that in a second appeal, like the present, the Court is not entitled to interfere with the concurrent findings of facts by the two lower courts except in rare occasions where it is shown that there has been a misapprehension of evidence or misdirection

causing a miscarriage of justice. See the cases of **Nchangwa Marwa Wambura v. Republic**, Criminal Appeal No. 44 of 2017 CAT at Mwanza, (unreported), **Musa Hassani v. Barnabas Yohanna Shedafa (Legal Representative of the late Yohana Shedafa)** Civil Appeal No. 101 of 2018 CAT at Tanga (unreported), **Amratlal Damodar and Another v. H. Lariwalla [1980] TLR. 31**, in the that for instance, it was held that:

"Where there are concurrent findings of fact by two courts/ the Court of Appeal, as a wise rule of practice/ should not disturb them unless it is clearly shown that there has been misapprehension of evidence/ a miscarriage of justice or violation of some principle of law or procedure."

Flowing from the above, it is my considered view that the second appellate Court will only interfere with findings of fact of lower courts in situations where a trial court had omitted to consider or had misconstrued some material evidence; or had acted on a wrong principle, or had erred in its approach in evaluation of the evidence. In the instant matter having scanned the record of both lower courts I found nothing suggesting any of the

irregularities to warrant this court to re-evaluate and interfere with concurrent findings of the two lower courts. For example, the appellant's evidence was to the effect that on 15/02/2021 the appellant and the respondent entered into an agreement for the respondent to buy rice paddy of the appellant. The appellant showed a clean sample of rice to the respondent claiming to be the rice from his paddy. Being convinced by the sample, the respondent purchased 60 sacks of paddy from the appellant. On the same day, the respondent took the paddy to the rice processing mill. To her surprise the rice from the paddy she bought came out differently from the sample of rice she was shown. She called the appellant by phone and he promised to compensate the loss she would suffer. On 16/02/2021 the respondent approached the village leaders for resolving the dispute. Before the village government they agreed that the appellant should compensate the respondent by paying her TShs. 1,020,000/= since the paddy sold to her was not suitable for the business of the respondent. The appellant promised to pay the sum on 20/2/2021 but he did not honor the promise. The respondent went to police, at the police the appellant again promised to pay the sum and

they reduced the agreement into writing and signed it. The agreement was tendered and admitted as Exhibit P.1. the respondent also tendered the two sample of the rice which was admitted as Exhibit P.2.

The respondent called one witness from the village government who testified on what the two agreed at the village government office.

In his defence the appellant did not deny to sell the paddy to the respondent but he testified that, he asked for the respondent to return the paddy for him to pay back the sum he received from the respondent. He did not refute the fact that he agreed before the village government office and before the police to pay Tshs. 1,020,000/=. Under those circumstance the trial Primary Court found the evidence of the respondent weighing heavier than that of the appellant. It thus ordered the appellant to pay the agreed sum i.e 1,020,000/= or he return the total sum he received and the respondent return the rice since all sucks of paddy had been already processed into rice. The District Court confirmed the decision.

Considering the decisions of the two lower courts, I find nothing like misapprehension of evidence or violation of some principle of law or procedure for this court to fault their decisions.

Owing to the findings above, I hereby dismiss the appeal for lack of merits with costs.

Ordered accordingly.



R.A. Ebrahim
JUDGE

The image shows a handwritten signature in black ink, which appears to be "R.A. Ebrahim". Below the signature, the name "R.A. Ebrahim" and the title "JUDGE" are printed in a bold, black font.

Date: 17.12.2021.

Coram: Hon. A.E. Temu - DR.

Appellant: Present

Respondent: Presented by Hamis Mohamed that respondent is sick.

B/C: Gaudensia.

Court: Judgement delivered in open chamber in the presence of both parties.



A.E. Temu

Deputy Registrar

17/12/2021
