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

**(IN THE DISTRICT REGISTRY)**

**AT MWANZA**

**PC CIVIL APPEAL NO. 66 OF 2021**

*(Arising from Civil Appeal No. 16 of 2021 from Ukerewe District Court originated from the decision of Nansio Primary Court in Civil Case No 10 of 2021.)*

**ELIAS AMOS KASHETO---------- APPELANT**

**VERSUS**

**DAVID JUMANNE SABATO----------RESPONDENT**

**JUDGMENT**

*Last Order: 06.04.2022*
*Judgement Date: 19.04.2022*

**M. MNYUKWA, J.**

In this appeal, the appellant Elias Amos Kasheto appealed against the decision of Ukerewe District Court in Civil Appeal No. 16 of 2021. The appellant who was also the appellant at Ukerewe District Court was aggrieved by the decision of the trial court in Civil Case No 10 of 2021 that was heard and determined by Nansio Primary Court. Some factual

background will be crucial to highlight the dispute between the parties and the issues involved in the present appeal.

As per the record, it was alleged that parties in this appeal entered into the sale agreement of selling the motor vehicles' spare parts shop (hereinafter to be referred as a shop). That, in execution of the sale agreement, the appellant sold the said shop to the respondent which contained various motor vehicles' spare for Tsh. 8,000,000/=. According to the sale agreement, the parties entered into the binding contract on 10/08/2020 and in order to effect transaction, the payment was done on the same day as it was stated in the sale agreement that was admitted as Exhibit P1 before the trial court.

It was further alleged that, the parties entered into oral agreement of purchasing the spare parts in order to carry on the business and the respondent gave Tsh. 3,000,000/=. to the appellant based on his expertise to purchase the spare parts from Dar es Salaam.

Unfortunately, the appellant did not purchase the spare parts as agreed. Sometimes in September 2020, the appellant terminated the contract of selling shop to the respondent and promised to return the purchase price which was Tsh. 8,000,000/=, the costs incurred by the respondent to Tanzania Revenue Authority to have the necessary

document of the shop to be on his name which cost Tsh. 500,000/= and Tsh. 3,000,000/= that he received from respondent as a purchase price of spare parts from Dar es Salaam.

The appellant promised to make payment of the above stated items on 10/11/2020 at the tune of Tsh. 11,500,000/=. Regrettably, the stated amount was not paid and that compelled the respondent to institute the case against the appellant at Nansio Primary Court, claiming a total amount of Tsh. 18,500,000/=. Tsh. 11,500,000/= being a principal amount and Tsh. 7,000,000/= being damages for termination of contract by the appellant.

During the hearing of the case before the trial court, the respondent brought one witness apart from himself and tendered exhibits that were admitted as Exhibit P1 and P2 collectively. On his part the appellant fended himself. On its wisdom, the trial magistrate summoned the commissioner for oath who witnessed the sale agreement of the parties to testify on his involvement in the sale agreement. After hearing both parties, the trial court found that the respondent managed to prove his case on the balance of probabilities and the appellant was ordered to pay Tsh. 8,500,000/= since the other claims were not substantially proved.

Dissatisfied with the trial court's decision, the appellant appealed to the District Court of Ukerewe (herein after to be referred as the first appellate court) by advancing three grounds of appeal to wit:

1. *That the trial court magistrate erred in law and fact by not considering the watertight evidence from the appellant which build his case.*
2. *That the trial court magistrate erred in law on evaluation of evidence on record.*
3. *That the trial court magistrate was tainted with bias in framing of issues which could determine the matter without any bias.*

Upon hearing of the appeal, the first appellate court dismissed the appeal and upheld the trial court's decision.

Aggrieved further by the decision of the first appellate court, the appellant appealed to this court by presenting the petition of appeal that contains five grounds of appeal which are;

1. *That the trial court had erred in law and fact for pronouncing the judgement in favour of the respondent based on the documents collectively admitted as exhibit P1;*

2. *The trial court erred in law and fact for awarding Tsh. 8,500,000/= to the respondent without proof*
3. *That the trial and appellate court erred in law and fact to award special damages based on exhibit P1 without ascertaining the authenticity of the document and the appellant signature appearing therein.*
4. *The trial and appellate court erred in law for admitting and relying on exhibit P1 while the stamp duty was not paid.*
5. *That the trial magistrate grossly erred in law and fact when he failed to properly consider and correctly evaluate or analyse the evidence adduced at the trial court.*

Whereas the appellant prayed for the appeal to be allowed, costs of the suit and any other reliefs this court may deem fit and just to grant.

In this court, the appeal was argued orally. During the hearing, both parties were unrepresented. Arguing in support of the appeal, the appellant being a layman did not have much to submit. He submitted that, the first appellate court and the trial court ordered the appellant to pay the respondent Tsh. 8,500,000/= without any explanation and reasoning as the amount claimed by the respondent was Tsh. 18,500,000/=. He

further challenged the amount claimed was out of their agreement as he disputed to take the claimed amount of money from the respondent.

Responding, the respondent being a layperson too and unrepresented was very brief. He prayed to adopt his reply to a petition of appeal to form part of his submission. He submitted that, Exhibit P1 that was admitted by the court was the sale agreement by the parties to sell the shop. He went on that the evidence was properly evaluated before the trial court after considering the evidence presented by the parties.

Re-joining, the appellant prays his petition of appeal to form part of his submission.

After hearing the submission of both parties, the only issue for consideration and determination is whether the appeal is meritorious. In answering this issue, I will determine jointly the first, second and fifth grounds of appeal as they are intertwined as both of them challenged the trial court and the first appellate court to have failed to analyse and evaluate the evidence properly and to rely on Exhibit P1 to reach its decision.

At this stage, I will not entertain the third and the fourth grounds of appeal since they are new grounds of appeal as they were not raised and determined in the first appellate court. (See the case of **Ngaru Joseph**

**and Mnene Kapika v R**, Criminal Appeal No 172 of 2019, CAT at Mbeya and the case of **Ramadhani Fadhili Kitumbo v Hamidu Idrisa**, Land Appeal No 3 of 2021 HC at Kigoma, (unreported)).

Before I embark to determine the appeal, in the due course of composing this judgment, when I carefully went through the available record, I found that the trial court records do not show if the witness called by the court, the learned advocate, who witnessed the sale agreement between the parties was sworn before his evidence was taken. I therefore summoned the parties through audio teleconference to address the court on that issue.

Addressing first, the appellant stated that the evidence of the learned advocate was taken without oath and he prayed this court not to consider his evidence. On his part the respondent stated that he does not remember if the evidence of the said witness who was called by the court was taken under oath or not and he left the court to decide in regard to his evidence.

In view of the above submissions of the parties, it is a settled position of law that every witness who testifies before the court his evidence should be taken under oath by either affirmation or swearing. This is the requirement of the law as it is provided under Rule 46 (2) of

the Magistrates Court (Civil Procedure in Primary Court) Rules, GN No 310 of 1964 which requires the evidence of every witness to be taken under oath.

Following the fact that the court records are trustworthy and need to be believed, and since the trial court's record is silent if the said witness who was called by the court testified under oath, taking into consideration that parties addressed the court on different path as to whether the said witness gave his evidence under oath or not and considering the fact that the said witness was called by the court, it is my considered view that, for the interest of justice, his evidence be expunged from the records. Thus, I hereby expunge the learned advocate's evidence from the record and therefore his evidence will not be considered in this judgement.

Now, turning to our appeal at hand, the main concern of the appellant is that, the lower courts failed to evaluate the evidence properly and it was improper for it to rely on exhibit P1 to decide the matter in favour of the respondent.

Before I go further, I reminded myself with the well-established principle of law that the second appellate court should not interfere with the concurrent findings of the two courts below unless there is justification of doing so.

In the case of **Helmina Nyoni v Yerenia Magoti,** Civil Appeal No 61 of 2020, CAT at Tabora (unreported) pointed out that:

> *"... It is trite law that the second appellate courts should be reluctant to interfere with concurrent findings of the two courts below except where it is obvious that the findings are based on misdirection or misapprehension of evidence or violation of some principle of law or procedure, or have occasioned a miscarriage of justice."*

I am also alive with the standard of proof in civil cases as it is on the balance of probabilities which means that the primary court will accept and reach its decision on the evidence which is pertinent, worth of belief and stronger that prove the allegation brought before it as it is provided for under section 19(2) of the Magistrate's Courts Act, Cap 11 R.E 2019.

The above requirement is in line with Regulation 6 of The Magistrates Court (Rules of Evidence in Primary Courts) Regulations, 1964 G.N No. 22 of 1964 which mandates the primary court to accept such evidence of one party which is greater than the evidence of the other and ultimately declare him the winner over the other party whose weight might not be greater. (See the case of **Helmina Nyoni** cited supra)

After I carefully scrutinized the record of the trial court and the first appellate court and going through the submissions of the parties, as I have earlier on stated that the main controversy is the claim of amount of money which is alleged to have been given to the appellant in respect of the sale agreement of shop. The available record speak louder through exhibit P1 which provides a clear picture that the parties herein entered into an agreement to sell the appellant's shop and they executed the sale agreement through a written contract.

It is an averment of the appellant that, he does not recognize Exhibit P1 which is the contract as well as his signature in that contract. Upon my close examination of the written contract entered between the parties, I am satisfied that the parties entered into a contract to sell a lawful object with their consent and with the intention to create a legal relationship between them. In the said Exhibit P1, both parties signed the contract, where the price of the contract was Tsh. 8,000,000/= which was paid in consideration of purchasing the motor vehicle spare parts listed in the contract.

In addition to that, in order to make it more valid, the contract was witnessed by the parties' respective witnesses. And in order to substantiate that the parties entered into a valid contract, the respondent

called his witness, SM2 who testified that he was the witness who put his signature in the sale agreement as it is reflected on page 18 of the trial court's proceedings. Therefore, the averment of the appellant as it is seen on page 15 of the trial court's proceedings that he did not sign the contract is baseless.

Even though parties entered into a written contract they have orally agreed the appellant to continue to run the shop but the appellant did not show cooperation to hand over the cash sales to the respondent and after a month the appellant terminated the contract and stopped the respondent to go to the shop and this compelled the respondent to institute a case against the appellant.

The records further suggest that due to his expertise on mechanics and sale of spare parts and the trust of the respondent to the appellant, the appellant was still running the business even after sale and that's why the shop was still in his possession. This was also rightly stated by the magistrate of the first appellate court in his judgement that, as the appellant had sold his motor vehicle spare parts business to respondent, it is impossible to own again the said business. This is an indication that, the appellant had promised to refund respondent but he failed to do so.

The above observation of the first appellate court is supported by the evidence of the respondent at the trial court when cross examined by the appellant that they agreed the appellant to supervise the business as he had a goodwill to the customers who are the public servants.

Furthermore, it is on record that the appellant alleged in the trial court and in his submission at the first appellate court that they have agreed with the respondent that he should use his shop of spare parts so as to secure loan as the respondent was in need of loan. I find this allegation to be unsubstantiated as the appellant did not bring any witness to support his allegation. Surprisingly, he failed even to call his wife whom he alleged that she was present when the respondent asked to use his business of spare parts as a security for loan in the bank.

Against the above, after his defence evidence, the appellant prayed to close his case and he did not inform the court that he had a witness to call to counter the respondent's allegation. For that reason, my mind is settled that, the party who intended to rely on the evidence of the other party to support his case is under a primary duty to call that witness whom he thinks is able to testify. It is the position of the law that, it is the duty of the party to summon material witness to prove its case.

On top of that, in his ground of appeal and his submission the appellant also claimed as to how the two courts below awarded the payment of Tsh. 8,500,000/= while the total amount claimed by the respondent was Tsh. 18,500,000/=. Upon going through the complaint form which is Form No. 63 used to initiate a claim in the primary court, the respondent was claiming Tsh. 18,500,000/= as it was clearly analysed by the trial court in its judgment that the respondent has failed to prove the payment of Tsh. 3,000,000/= to the respondent which he alleged to have given him for the purchase of spare parts in Dar es Salaam. He also failed to prove the damages of Tsh. 7,000,000/= as the termination of the contract was within a period of one month and therefore failed to account any loss occasioned for not being in possession of the said shop.

Thus, this makes the total amount claimed and proved by the appellant to be Tsh. 8,500,000/= as ordered by the trial court and upheld by the first appellate court. The above figure was a sale price of the shop, Tshs, 8,000,000 and the costs used by the respondent to effect transfer of the documents of the shop into his name which was not objected by the appellant to the tune of Tshs. 500,000/=

In view of the above, I find the appeal lacks merit and it is hereby dismissed with costs.

It is so ordered.

Right of appeal to the Court of Appeal explained to the parties.

**M.MNYUKWA**
**JUDGE**
**19/04/2022**

**Court:** Judgment delivered on this day 19th April, 2022 in the presence of the parties.

**M.MNYUKWA**
**JUDGE**
**19/04/2022**