

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA**

PC CIVIL APPEAL NO. 64 OF 2021

*(Arising from Civil Appeal No. 2 of 2021 of Ilemela District Court, originated from
Civil Case No. 77/2020 at Ilemela Primary Court)*

**BON & PAT Security LTD ----- APPELLANT
(Erasmus Joseph Mbalazi)**

VERSUS

MPONJI MHAGAMA----- RESPONDENT

JUDGEMENT

*Last Order: 28.07.2022
Judgement Date: 4.08.2022*

M. MNYUKWA, J.

The appellant herein is a losing party in two subordinate courts, whereas originally, he was sued by the respondent for a claim of a sum of Tshs. 2,050,000/= before Ilemela Primary court, being a compensation of the value of properties stolen from the respondent's house, as he was contracted to provide security services.

The brief background of the case goes that; the respondent herein entered into a contract with the appellant for security services in his



house. The said contract was tendered and admitted before the trial court as Exhibit G1. It was alleged that, on 20th October 2018, thieves broke into the respondent's house and stole some of his properties including Samsung Tv 42 inches, a laptop bag, a Vodafone mobile phone, modem and flash disk valued a total of Tsh. 2,050,000/= . On a fateful night, the security officer who was in service was found sleeping under the sink. It was further alleged that, the incident was reported at the police station, and the security officer was charged and arraigned to the court, in which the respondent was advised to file a civil suit against the appellant for compensation of his stolen properties.

The respondent filed a civil suit No. 77/2020 before Ilemela Primary Court against the appellant claiming Tsh. 2,050,000/= being the value of the stolen properties. The respondent grounded his claim on negligence on part of the appellant. At the trial court, the respondent had three witnesses who witnessed that there was a contract of security service between the respondent and the appellant and that thieves broke into the respondent's house and some of his properties were stolen. The respondent also tendered the contract of service between him and the appellant which was admitted as exhibit G1, two receipts of some of the received properties, collectively admitted as exhibit G2 and RB from police was admitted as exhibit G3.



The appellant contested the respondent's claim besides recognizing that there was a contract of service. The appellant rebutted the respondent's claim that thieves broke into his house. At the end of the trial, the respondent was pronounced a winner and he was awarded Tsh. 2,050,000/= as prayed.

The appellant was not amused by the trial court's decision and he appealed to Ilemela District Court praying for the trial court's decision to be set aside, cost of the suit and any other relief the court may be pleased to grant relying on the five grounds of appeal as follows;

- 1. That the trial court erred both in law and in fact for failure to properly evaluate the evidence on record and failure to appreciate the appellant's evidence.*
- 2. That, the trial court magistrate erred both in law and fact by deciding in favour of the Respondent without tendering a copy of judgement to prove the charge of stealing against the appellant employee (security guard).*
- 3. That the trial court erred both in law and in fact for appreciating respondent evidence that he filed a criminal case against the Appellant's security guard, was convicted and ordered to compensate his stolen properties, while in fact there was no such order.*
- 4. That, the trial magistrate erred both in law and in fact for awarding Tsh. 2,050,000/= to the Respondent on a mere*



assumption that he tendered receipts of the stolen properties and police RB.

- 5. That, it is requirement of the law to prove the charge of stealing before filling a civil suit for compensation the fact which the Respondent escaped.*

The first appellate court determined the 2nd, 3rd and 4th grounds of appeal as argued by the parties through written submissions and finally, the first appellate court dismissed the appeal on the ground that, the respondent managed to prove his case on a balance of probabilities as he managed to prove the existence of theft and existence of the contract on security services between the appellant and the respondent.

Aggrieved further, the appellant has knocked on the doors of this court for further pursuance of his right, raising 5 grounds of appeal as reproduced hereunder;

- 1. THAT, the 1st appellate court erred both in law and facts for dismissing the case relying on the fact that there was a contract between the appellant and the respondent.*
- 2. THAT, the trial court and the 1st appellate court erred in law and in fact for entertaining the issue of criminal case by acknowledging that, there was theft while there was no any proof of judgement given out by the respondent to that effect.*



3. *THAT, it is a requirement of the law to prove the charge of stealing before filling civil suit for compensation the fact which the respondent escaped.*
4. *THAT, the 1st trial magistrate court erred in law and in fact for awarding Tsh. 2,050,000/= to the respondent on a mere assumption that he tendered receipts of the stolen properties and police RB.*
5. *THAT, the appellate court erred in law and facts not to accord to the standard required in a criminal case which is to prove beyond a reasonable doubt in criminal cases.*

The appellant prays for the 1st appellate court decision to be set aside, his appeal to be allowed with costs and any other relief this court may deem fit and just to grant.

When this matter came for hearing, the respondent's whereabouts was unknown and so, he was served through a substituted service of a newspaper and still he did not enter appearance and therefore the matter proceeded ex-parte against him. The appellant was represented by Godfrey Ernest, learned counsel.

During the hearing, the appellant's counsel opted to argue the 3rd, 4th and 5th grounds of appeal collectively and he abandoned the 1st and 2nd grounds of appeal. It was his submission that, referring to the first and second page of the trial court's decision, it is clear that the respondent



claimed that, theft has occurred in his residence in which it is a criminal case and that the respondent was given RB from the police.

He further submitted that, there was no any court that gave decision on a theft case to prove that there was theft. That, it is a principle in criminal law that the respondent had a duty to prove theft beyond a reasonable doubt. That it was the duty of the respondent to prove theft and not the appellant's duty.

Appellant's counsel further cited section 110(1) and (3) of the Evidence Act Cap. 6 RE: 2019, that the provision requires any person who demands legal right, to have a duty to prove and, therefore, it was the respondent's duty to prove the offence of theft alleged to be committed in his house. He finalised his submission by praying this appeal to be allowed with costs and any other relief this court may deem fit to grant.

Having gone through the court's records, raised grounds of appeal and the appellant's submission, the issue for determination is whether this appeal has merit.

In his submission, the appellant's counsel argued the 3rd, 4th and the 5th grounds of appeal collectively, in which his submission centred on the point that the respondent failed to prove beyond reasonable doubt that, theft occurred in his house, as it is a requirement of the law. With due respect, I am quick to say that, the appellant's counsel has



misdirected himself in applying the principle of criminal law in a civil suit. From the argued grounds (the 3rd, 4th and the 5th grounds of appeal) the appellant's counsel insisted that the respondent had a duty to prove beyond reasonable doubt that, theft occurred in his house as there is no court decision that proved that theft occurred. Looking at the trial court's record, the respondent filed his claim based on the contractual obligations that were raised from the contract (Exhibit G1), entered between the appellant and the respondent in which the appellant did not dispute that it existed.

It is a settled principle of law that in civil cases, the standard of proof is on the balance of probabilities, as it was held in the case of **Daniel Apael Urrio vs Exim (T) Bank** Civil Appeal No. 185 of 2019, in which the Court of Appeal sitting at Arusha while quoting with approval the case of **Mathias Erasto Manga v Ms. Simon Group (T) Limited**, Civil Appeal No. 43 of 2013, stated that;

"The yardstick of proof in civil case is the evidence available on record and whether it tilts the balance one way or the other. departing from this yardstick by requiring corroboration as the trial court did is going beyond the standard of proof in civil case."



Considering that the respondent filed a civil suit against the appellant, the respondent's duty was to prove his case on a balance of probabilities that he had a contract with the appellant, that his properties were stolen while the appellant was in service and lastly that their contract stipulated that the appellant would be liable in case the respondent had suffered damages caused by appellant's negligence.

This duty to the respondent is in accordance with Regulation 6 of The Magistrates' Courts (Rule of Evidence in Primary Courts) Regulation, GN No 22 of 1964 which states that;

Regulation 6

"In civil case, the court is not required to be satisfied beyond reasonable doubt that a party is correct before it decides the case in its favour, but it shall be sufficient if the weight of the evidence of the one party is greater than the weight of the evidence of the other".

Looking at the cited case and the provision of the law above, it is clear that, the appellant's submission that the case concerning theft was not proved beyond a reasonable doubt is of no basis, taking into consideration that the respondent filed a civil case against the appellant. Further, the absence of criminal case judgement would not have barred



the respondent from lodging his civil case, as the respondent was only duty bound to prove his case on a balance of probabilities.

Now, I would go as far as to examine if the respondent managed to prove his case on a balance of probabilities. Keeping in mind that this is the second appeal, and as the second appellate court, I have a duty not to interfere with the concurrent findings of the lower court unless it is apparent that, there was a misapprehension of evidence or irregularity that will lead to the misapprehension of justice. (See the case of **Juma Kana and Another vs Fita Tabu**, Civil Appeal No. Civil Appeal No. 162 of 2018).

From the trial court's records, the respondent in proving his case, he tendered a contract between him and the appellant which was admitted as Exhibit G1 to show that he had hired the appellant for the security services. The fact which was not disputed by the appellant as reflected on his testimony on page 18 of the typed proceeding when the appellant admitted that the respondent had hired them and when theft had occurred, the security guard was at the respondent's house.

Further the, the respondent managed to show that theft occurred in his house, as per the respondent's testimony and the witnesses he brought to court who were his wife and his neighbour who testified to the effect that, the respondent's house was invaded and his property were



stolen. The respondent also tendered RB which was exhibit G3 to show that theft incident was reported. It is my view that, that was enough to prove on a balance of probabilities that, his house was raided that night.

Furthermore, the respondent had tendered receipts of the stolen properties to show that he had suffered loss while the appellant was obliged to protect his properties. The appellant disputed that there were no properties that were stolen, however comparing to the respondent's evidence, it is my strong opinion that the respondent had strong evidence against the appellant.

Lastly, the respondent had a duty to show that their contract stipulated that the appellant would be liable to compensate him in case he suffers loss. From the tendered exhibit G1, as provided under paragraph 13, it is clear that the appellant was under obligation to compensate the respondent as even the appellant's evidence as clearly shown on page 19 of the typed proceeding when answering the court's assessors, he replied that the guard was just outside. That means the day the incident occurred the guard was there and still the respondent's properties were stolen which shows that it was the appellant's negligence.

Therefore, I agree with the trial court and the first appellate court's decisions that, the respondent managed to prove his case on a balance of probabilities, which is the required standard in civil cases.



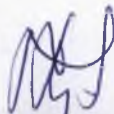
Before I wind up, I am inclined to correct the first appellate court and the appellant's counsel that, section 110(1) and (2) of the Law of Evidence Act does not apply in our case taking into consideration that, this matter originated from Primary Court in which the Law of Evidence Act does not apply, however, the same section is in pari materia to Regulation 1(2) of The Magistrates' Courts (Rule of Evidence in Primary Courts) Regulation, GN No 22 of 1964 which requires the person alleging existence of some facts to prove them.

From the above findings, I find no grounded reasons to interfere with the findings and decisions of the two lower courts below. Thus, this appeal is dismissed with cost and the decision of the trial court and the first appellate court are hereby upheld.


It is so ordered.

Right of appeal explained.




M. MNYUKWA
JUDGE
4/08/2022

Court: Judgment delivered this 4th August 2022 in the presence of the appellant's counsel.


M. MNYUKWA
JUDGE
4/8/2022