

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CIVIL APPEAL NO 32 OF 2021

*(Arising from Civil Appeal No. 46 of 2020 in the District Court of Musoma at Musoma,
Originated from Criminal Case No. 29 of 2020 at Musoma Urban Primary Court)*

MOSHI MAKURU APPELLANT

VERSUS

ABDALLAH CHACHA NYAKULENGA RESPONDENT

JUDGMENT

9th and 28th March, 2022

F. H. MAHIMBALI, J.:

This is now a second appeal in which the appellant is challenging the decision of the trial court on account that it erred in reaching its verdict against her.

The background facts leading to this appeal can be summarized this way: The respondent is said to have been transacting in fish business in which the appellant by oral contract entered an agreement with the respondent. She had then been taking several fish on promise that she would settle. The fishing transaction between the two then

reached 1,570,000/= which stood unpaid by January 2020. Despite repeated claims by the respondent to the appellant, it was not easy for the appellant to settle the outstanding balance to the fish supplied to her. This then prompted the respondent to file a civil suit at the Primary Court of Musoma Urban, whereby the trial court was satisfied with the respondent's evidence that the said claims were established in balance of probabilities as per law.

The appellant was dissatisfied with that verdict, she then unsuccessfully challenged it before the District Court of Musoma. This is her second appeal to this Court based on the following six grounds:

- 1. That, the trial Magistrate grossly erred in law by failure to find the opinion of the court assessors in his judgment.*
- 2. That, the trial Magistrate misdirected himself when he failed to consider that the respondent had cause of action against the appellant for the claimed business involved the wife of the respondent and appellant.*
- 3. That, the trial Magistrate erred in law by failure to find that a wife and a husband are no longer considered as one in law and therefore the respondent is not privy to the contract which was deemed to exist between the respondent's wife and the respondent.*
- 4. That, the trial magistrate has fatally failed to consider that there existed no any form of contract between the*

respondent and the appellant be it oral or written contract. There is no any contract which was tendered or its terms proved in court.

- 5. That the trial magistrate has misdirected himself by considering the testimony of HASSAN MAXIMILLIAN who knew nothing about the fish business and failed more he failed to treat the evidence of SM1 and SM2 with caution because they are husband and wife respectively, therefore this case was not proved per the required standards.*
- 6. That, the trial magistrate has transgressed civil procedures laws as court assessors have not participated in every stage of the proceedings of the case.*

During the hearing of the appeal, both parties appeared in person and unrepresented.

On her party, the appellant had nothing material to add but just prayed that her grounds of appeal be adopted by the Court to form part of her submission. She invited the Court to consider her grounds of appeal and allow it with costs.

On the other hand, the respondent who didn't file his reply to the grounds of appeal, prayed to reply them verbally in Court.

With ground no 1, relying on the proceedings of the trial court, he countered it as being bankrupt of merit. He submitted that the trial court

as well as the appellate court were right in finding the assessors' opinion as incorporated into the trial court judgment.

With ground no 2, he submitted that it is not true that the said transaction was between his wife and the appellant, but as his wife was known to the appellant, so it was through his wife that the appellant came to know his business place (fishing industry). Therefore, it is not true that she transacted with his wife but with him directly. The wife was just a connector for her to reach him in the fishing business.

With the third ground (no 3), he considered it as replica to ground two, and submitted that his wife is not party to this contract as she was just a witness.

On ground four of the appeal, he submitted that their contract was not in writing but it was based in trust. On this, he invited this Court to see exhibit no 7 of this case.

With ground no 5, he responded that there was ample evidence that established his claims at the trial court. He considered this ground being baseless as he had a stronger case against her.

Lastly, on ground no 6, he submitted this ground of appeal being baseless and misplaced. The court record is clear that court assessors

were in an attendance during the hearing. The court record speaks by itself from day one to the last day, and that where any assessor missed attendance on reason of sickness or bereavement, the proceedings were adjourned.

He concluded his submission by urging this court to dismiss this appeal with costs as the appellant has missed any sound point to challenge the decision of the trial court in the second appeal as well.

Having heard the submissions by both parties, the question to ask is whether this appeal is meritorious. In deciding so, as per submission of the grounds of appeal, I will consider two things. Firstly, on legal perspective whether there were court assessors who participated in the proceedings at the trial court and gave their opinions as per law. Secondly, whether there was evidence in the trial court that the appellant transacted with the respondent in the said fish business.

On the participation of the court assessors at the trial court, I am satisfied that as per trial court's proceedings the assessors in attendance were two: Mecky and Fatuma. Though their particulars are not stated in the said record if had all qualifications to serve as court assessors at the trial court as per law in respect of that case, the trial court record

establishes that they participated from day one to the date of the judgment and they signed on it signifying that the judgment is theirs. One thing that must be clarified with the role of court assessors at the primary court and at District Land and Housing Tribunals is this, whereas at the primary court they sit and discuss with the trial magistrate, what they agree is the judgment of the court which is normally on majority basis (See Rule 3 (1) (2) of the Magistrates' Courts (Primary Courts) Judgment of Court rules, Government Notice No.2 of 1988. Conversely, at DLHT, tribunal assessors upon hearing of the suit, give their written opinions to the DLHT (Chairperson in open session) and are filed. So, the appellant might have mixed issues with the role of court assessors in primary court against that in the DLHTs. Therefore there must be drawn a line of distinction between the two. So, the contention that there were no court assessors at the trial court's proceedings and that their opinions not considered is bankrupt of merit. The judgment is self-explanatory and that the proceedings have said it all. See typed proceedings at pages 6, 10, 12, 14, 18, 21 and 22 on assessors' attendance and involvement at the trial court.

Whether the evidence on record has satisfactorily established the claimed amount as per statement of claims. Considering the

respondent's case at the trial court, I have not seen solid evidence establishing claims against the appellant. The transaction between the appellant and the respondent is not established by any solid evidence. The purported exhibit P1 its genuineness is questionable as it is first not signed and that it is just one sided. It is astonishing that when the respondent was supplying the said fish to the appellant on credit no one there at the scene witnessed it. In the case of **Catherine merema V. Wathaigo Chacha**, Civil Appeal No. 319 of 2017 where the Court of Appeal stated that:

"In case of oral contract to be enforceable, it is expected to be in the presence of witnesses".

Though the first appellate court is aware of the legal principle on the enforceability of the oral contract, he misapprehended the law as per evidence in record which has not stated anything material. The law has always been this, in deciding all cases the court must confine itself to the material facts which are proved during court session and not otherwise. A court must not take into account any fact relating to the case which it hears out of court except facts learnt in the presence of the parties in court or during a proper visit to any locus in quo.

The Civil Procedure Rules for Primary Courts, provide that where a person makes a claim against another in a civil case, the claimant must

prove all the facts necessary to establish the claim unless the other party (that is the defendant) admits the claim. In the current case, it was a claim on fish business against the appellant by the respondent. It was thus expected by the respondent to establish that he had been in transaction with the appellant. That on dates which she effected payments, there ought to have been evidence in that respect and so was on dates on which she defaulted payments or took by credit. The records or other evidence must have been clear. The said Exhibit which is not signed by the respondent nor the appellant and does not state any transaction save dates, volume of fish, price, price per Kg and the total claims per transaction is in my considered view nothing but just a mere paper with no any legal value.

This being a Court of law, it was expected for the respondent to have made up his claims well; I agree with the reasoning of the trial magistrate that in civil cases there cannot be an equal verdict. Only a party whose evidence is heavier than the other, is the one who must win and not otherwise (**Hemed V. Mohamed Mbilu** [1984] TLR 113). Nevertheless, the trial court and the first appellate court misapprehended the facts and evidence of the case and reached to

contrary verdict, unsupported by facts and evidence of the case as adduced.

Having said that, I find the trial court's findings that the respondent made up his case well in the required legal standard is unsupported by evidence in record. Without demur, that was the poorest case by the respondent at the trial court and wrongly upheld by the first appellate court. All that SM2 stated is nothing but hearsay evidence from which the same is of no legal value.

In the end result, the appeal is allowed with costs.

DATED at MUSOMA this 28th day of March, 2022.



F. H. Mahimbali

Judge

Court: Judgment delivered this 28th day of March, 2022 in the presence of Appellant, Mr. Gidion Mugo, RMA and respondent being absent.

Right to appeal is explained.

F. H. Mahimbali

Judge

28/03/2022