

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA**

PC CIVIL APPEAL NO 55 OF 2021

(Arising from Civil Appeal No.7 of 2021 in the District Court of Chato, Originating from Civil Case No. 123/2020 Primary court of Chato District at Chato)

MARTINE ATHANAS..... APPELLANT

VERSUS

NANDI KIBERENGHE..... 1ST RESPONDENT

REGINAD MBANI2ND RESPONDENT

JUDGMENT

22nd Feb. & 12th April, 2022

Kahyoza, J.

Martine Athanas instituted a suit in the primary court against **Nandi Kiberenge** and **Reginard Mbani** claiming Tzs. 25,090,000/= . He alleged that **Nandi Kiberenge** and **Reginard Mbani** borrowed Tzs. 25,090,000/= and defaulted to repay. The primary court found in favour of **Martine Athanas**. Aggrieved, **Nandi Kiberenge** and **Reginard Mbani** appealed to the district court which reversed the decision of the primary court. Dissatisfied, **Martine Athanas** appealed to this court raising four grounds of appeal.

It is undisputed that **Martine Athanas**, the appellant was a businessman buying fish from fishermen and selling them to fish processing factory. **Nandi Kiberenge** and **Reginard Mbani**, the respondents, were fishermen who sold their catch to fish processing factory agents. The appellant allegedly gave fishing gears and cash to the respondents on credit amounting to Tzs. 25,090,000/=. **Martine Athanas** deposed that he sent Nyakutonya Pw2 to procure fishing gears for the respondents amounting to Tzs. 18,640,000/=. He added that gave the respondents money amounting to Tzs. 6,450,000/= on various dates and for various reasons. There was no written contract. The respondents breached the promise to repay.

The respondents, on their part, deposed that they were selling fish to the appellant, as an agent of a fish processing factory. Later, they abandoned him and commenced selling fish to another agent. Aggrieved, the appellant fabricated claims and sued them.

This is a second appeal. The parties enjoyed services of the learned friends. Mr. Saikon Justine, advocate represented appellant and Ms. Great advocate represented the respondents. The appellant's advocate abandoned the fourth ground of appeal retaining three grounds of appeal which raise the following issues-

1. whether the appellant proved his claim to the required standard;

2. whether the first appellate court wrongly held that documents tendered by Pw2 were irreverent and not admissible.

3. whether the first appellate court raised a new issue and determined it without hearing parties.

Did the first appellate court err to hold that the appellant failed to prove claims?

The appellant's advocate submitted that the first appellate court erred to hold that the claim was not proved on the balance of probability despite the appellant's cogent evidence on record, which outweighed the respondent's evidence. He argued that there was evidence from Pw2 that the appellant gave respondents fishing gears and money. He stated that the first appellate court misdirected itself in law to hold that documents tendered by PW2 were irrelevant and not admissible. He referred this Court to the case of **Hemed Said V. Mohamed Mbiu [1989] TLR 113**, the High Court held that;

"According to law both parties to a suit cannot tie but the person whose evidence is heavier than that of the other is the one who must win".

The appellant's advocate submitted further that parties entered into an oral agreement. The law recognizes an oral contract as it was stated in the case of **Catherine Merena V Wathaigo Chacha**, Civil Appeal No. 319 of 2017 at page 17.

The defence witness had no substantial evidence. They admitted that they were doing business with the appellant. They deposed that they later stopped doing business with the appellant and conducted business with another person called Joram. The new agent decided to find out from the appellant whether the respondents had any liability before concluding a contract with them. The appellant's advocate submitted that Joram was a vital witness and the respondents did not summon him or give reasons for not calling him. In the case of **Hemed** cited above, the court held that where for undisclosed reason a party fails to call a material witness on his side the court is entitled to draw adverse inference that if that person would have been called would have testified against him. He prayed this court to draw adverse inference against the respondents.

Ms. Great, the respondents' advocate replied that the appellant did not prove his case against the respondents as the appellant and his witness gave contradicting evidence. The appellant deposed that he was claiming Tzs. 25,090,000/= his witness deposed he bought fishing gears worth Tzs. 18,640,000/=.

The appellant's witness tendered receipts of the value of Tzs. 16,950,000/=. The receipts did not only not prove the appellant's claim but also did not bear the appellant's name. For that reason, it was proper for the first appellate to decide the respondents' favour.

In addition, the respondents' advocate argued that there was no evidence to prove handing over of the fishing gears between the appellant's witness and the first respondent. She concluded that the

appellant's witness proved that he procured his own fishing gears not related to this case.

The appellant several times mentioned Zagalo, a key witness, in his testimony. Zagalo was instrumental before the appellant and the respondents concluded an oral contract. The appellant testified that after the respondents breached the contract, he requested Zagalo to require the respondents to settle the debt. She submitted that Zagalo was a key witness and he would have easily assisted the court to resolve the dispute easily. Consequence of not calling a key witness was clearly elaborated in the case **Hemed Said** (Supra) cited by the appellant's advocate.

She contended further that the appellant had a duty to prove his claim, failure to call the key witness implies that he had no claims against the respondents. To support her contention, she referred to regulation 7 of the Magistrates' Courts (Rules of Evidence in the Primary Courts) Regulations, G.N. No. 22/1964 & 66 of 1972 (Rule of Evidence in the Primary Courts), which regulates bases of making decision. It requires courts to base their decisions on proved facts. The appellant (the plaintiff) did not prove the allegation, so the first appellant court was justified to decide in favour of the respondents. The appellant's evidence was not heavier than that of the respondents, basing on the contradiction between the appellant and his witness.

It is evident that the appellant's evidence was not heavier than that of the respondents. It is common knowledge that in civil suit he who

alleges must prove. The principle is embodied in rules 1(2) and rule 6 of the Rules of Evidence in the Primary Courts. The rules provide that-

1(2) 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.

Exceptions: N/A

6. Civil cases

*In civil cases, 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.***

Rules 1(2) and 6 of that the Rules of Evidence in the Primary Courts emphatically state that burden of proof lies on the person who positively asserts existence of certain facts. The person who alleges must prove what he asserts to the required standard of proof, which, in civil cases is on the balance of probabilities, see the decision in **Manager, NBC Tarime v. Enock M. Chacha** [1993] TLR 228. The appellant had a duty to prove that the respondents borrowed from him and defaulted to repay the loan before demanding the respondents did not prove that they did not borrow from him. The appellant did not discharge that duty.

It was part of the appellant's testimony that one person Zagalo beseeched him to advance loan to the respondents. Zagalo was not summoned to testify. The appellant's advocate submitted that Zagalo was not summoned since he was the respondents' uncle prone to testify in their favour. The appellant's advocate was a submission from the bar and not the appellant's explanation for his failure to summon Zagalo. It is not

plausible. There was another key witness in favour of the appellant, who is Joram. The appellant deposed that Joram called him to find out whether the respondents were indebted to him. The appellant told Joram that they respondents owed him a sum of money. Joram promised him that he will ensure the respondents settle the debt. He did not call Joram to testify.

As submitted, it settled that where for undisclosed reason a party fails to call a material witness on his side the court is entitled to draw adverse inference that if that person would have been called would have testified against him. See the case of **Hemed** (supra). I find the appellant's failure to call Zagalo and Joram emanated from fear that they will give adverse evidence. That is one of the reasons I find that the appellant did not prove his claim.

In addition, it is undisputed that the appellant alleged that he concluded an oral contract with the appellant. Oral contracts like written ones are enforceable. The biggest challenge associated with oral contracts is that, it is difficult to establish what parties to the contracts agreed. It was the appellant's contention that he concluded an oral contract with the respondents to buy for them fishing gears and sent Shaa Mabaganya Nyakutonya (**Pw2**) to buy the gears. Shaa Mabaganya Nyakutonya (**Pw2**) bought gears on different dates to the tune of Tzs. 18,640,000/= and gave them to the first respondent. There is no evidence to establish that how the appellant gave money to Shaa Mabaganya Nyakutonya (**Pw2**). Not only that but also there is no evidence showing the appellant introducing the first respondent to Shaa Mabaganya Nyakutonya (**Pw2**). It is on record

that Shaa Mabaganya Nyakutonya (**Pw2**) called the first respondent requesting to meet to the shop or factory where he bought fishing gears and handed the same to him.

As submitted by the respondents' advocate, there is no evidence to prove that the appellant's witness, Shaa Mabaganya Nyakutonya (**Pw2**), handed the fishing gears to the first respondent. Shaa Mabaganya Nyakutonya (**Pw2**) deposed that he handed the fishing gears to the first respondent. There was no documentation created. It is not against businessmen' customs to trust each other to that extent of advancing huge amount of money without documentation but such trust must be anchored on past record or on custom or norms or usage of a particular trade or business. In the present case, it was the first time the appellant advanced money to the respondents, he therefore needed some assurance that the respondents will repay the loan. Had it been true that the appellant sent Shaa Mabaganya Nyakutonya (**Pw2**) to buy fishing gears for the respondents, Shaa Mabaganya Nyakutonya (**Pw2**) should have required the first respondent to acknowledge receipt of fishing gears to prove to the appellant that he accomplished the task.

Worse still, the appellant did also not prove the terms of the agreement regarding mode and time of payment. It is again on record that the appellant gave the respondents some amount of money to procure a license and redeem their fishing gears, which were in the hands of law enforcers. No written document was executed. One wonders, in the absence of hidden facts or intention, why on earth would a person dish out

such an amount of money in cash and in the form of fishing gears without a clear agreement on the mode and time of repayment.

After considering the totality of the evidence on record, a conclusion that the appellant did not prove the claim to the required standard is inevitable.

Did the first appellate court wrongly held that documents tendered by Pw2 were irreverent and not admissible?

The appellant's advocate submitted regarding the second ground of appeal that the first appellate court misdirected itself in law to interpret the admissibility and relevancy of the documents by concluding that the documents tendered by PW2 were irrelevant and not admissible. He contended that PW2 was a competent witness to tender the documents as he explained at pages 14 and 15 of the proceedings of the trial court that he was doing the business together with the appellant. He was the one who brought fishing gears and handed them to the respondents. That was the reason why receipts were in his (Pw2's) name. He had all right to tender the receipt. To support his argument, he cited the case of **Yohana Paulo V. R.**, Criminal Appeal No. 281 of 2012 CAT (Unreported), where the Court of Appeal of Tanzania held that a possessor or owner may tender the exhibit provided he had knowledge of it. PW2 had knowledge of the exhibit so he was competent to tender the exhibit.

He added that Pw2 was a credible witness. He cited the case of **Godluck Kyando VR.**, [2006] TLR 363, where the Court of Appeal of Tanzania held that every witness is entitled to credence and must be

believed and his testimony accepted unless there are good and cogent reasons not believe him. He submitted that PW2 was trustful and the first appellate court had no reasons to believe him. Determination of credibility of a witness based on demeanor is a duty of the trial court. The first appellate discredited PW2 without giving reasons.

The respondent's advocate replied that the first appellant was justified to decide in favour of the respondents, as the document tendered had no any relevance to the issue before the primary court. The amount claimed by the appellant was not the amount stated by the witness and the name on the receipt was not the appellant's name. The appellant deposed that he bought fishing gears and gave them to the respondents.

The appellate court would not have relied on that evidence. The evidence was regarding the appellant's witness' business. She concluded that it is obvious that a receipt is always issued in the name of the buyer despite a fact that the buyer did not present himself to the seller.

In his rejoinder, the appellant's advocate argued that Pw2 explained that he did not write the appellant's name on the receipt as he was the one who ordered fishing gears from the factory.

Having heard the rival submissions, the issue is whether the first appellate court had justification to hold that receipts tendered were inadmissible and irrelevant. It is beyond dispute that the receipts tendered as exhibit were in Shaa Mabaganya Nyakutonya (**Pw2**)'s name. The respondents' advocate submitted that the receipts did not tally with the amount claimed. I have different opinion, the appellant explained that he

bought fishing gears and gave the respondents money. Thus, the appellant's claim would not tally with the amount indicated in the receipts. The appellant's claim was inclusive of money given in cash and money spent to buy fishing gears. However, I partly agree with the respondents' advocate that the receipts tendered did not tally with the amount alleged bought fishing gears.

The appellant's further advocate submitted that the receipts bore Shaa Mabaganya Nyakutonya (**Pw2**)'s name as he was the one who ordered fishing gears from the factory. The appellant's advocate requested this court to find Shaa Mabaganya Nyakutonya (**Pw2**) a credible witness unless there was evidence to the contrary. There is no evidence on record that Shaa Mabaganya Nyakutonya (**Pw2**) ordered fishing gears from the factory on the appellant's instruction. Shaa Mabaganya Nyakutonya (**Pw2**) told the court while replying to the first respondent's cross-examination that the receipts were in his name because he was the one who ordered fishing gears from the factory. He stated "*Niliandika kwa jina langu kwa sababu mimi ndiye niliyekuwa natoa order kiwandani.*"

It is on record that Shaa Mabaganya Nyakutonya (**Pw2**) had invested in fishing business. Shaa Mabaganya Nyakutonya (**Pw2**) deposed that "*Mimi nilikuwa nafanya biashara na ndugu Martine (the appellant)*". He introduced himself that he was a fish trader. It is very likely that receipts Shaa Mabaganya Nyakutonya (**Pw2**) tendered was in relation to his own business. I know no law stating that receipts should be issued in the name of a person making payments as submitted by the appellant's advocate.

Had Shaa Mabaganya Nyakutonya (**Pw2**) tendered ordered fishing gears for and on behalf of the appellant, the receipts ought to have been in the latter's name. It is my considered view, that there was no any good reason compelling the seller of fishing gears to issue receipts in Shaa Mabaganya Nyakutonya (**Pw2**)'s name. I find the receipts not relevant to the facts in issue, thus, not admissible. I have no reason to fault the first appellate court.

It is on record further that Shaa Mabaganya Nyakutonya (**Pw2**) tendered receipts in his own name and two other receipts in other persons' names; one, in the name of Zagalo; and another one, in Regina G. Mbayi's name. If the appellant wants me to believe that receipts tendered as exhibits were issued in Shaa Mabaganya Nyakutonya (**Pw2**)'s name because he ordered fishing gears from the factory, what about the receipts in the names of Zagalo and Regina G. Mbayi. Did Zagalo and Regina G. Mbayi order fishing gears on behalf of the appellant and give them to the respondents? There is no evidence to suggest that. It implies strongly that the appellant was patching evidence together. For that reason, I find the appellant's evidence unreliable.

In addition, it is on record that the trial court did not admit some of the receipts tendered as they bore the name of Zagalo. Unfortunately, the trial court skipped to say anything regarding receipts in the name of Regina G. Mbayi, which implies that it may have relied upon them to decide the appellant's favour. The record reads that-

"Risiti zenye majina ya Zagalo Kiberenge, Mahakama kwa pamoja imekataa kuzipokea kama kielelezo upande wa SM2 na Mahakama kwa pamoja imepokea nakala za risiti zenye jina la Shaah Nyakitona.... "

It is very likely that the trial court considered receipts which it rejected. I will leave this issue at that as the same was not argued to me.

Did the first appellate court raise an issue and determined it without hearing parties?

The appellant's advocate submitted that the first appellate court held that there was no contractual relationship between the appellant (plaintiff) and his witness. He contended that was a new issue. It was not an issue to before the trial court. Not only but also the first appellate court did not give parties a right to be heard before it decided the issue. Even if, it was an issue sections 134,137 and 139 of the Law of Contract [Cap. 345 R.E 2019] covers the issue principal and agent relationship and they allow a contract to be made orally.

The court ought to have invited the parties to address it regarding the issue as the Constitution of the United Republic of Tanzania and case law provide. To buttress his submission, he cited the case of **Mbeya, Rukwa Auto Parts Limited v. Jestine George Mwakyoma** [2003] TLR 251.

The respondent's advocate replied regarding the third ground of appeal that the first appellate court was justified to decide that there was

no contractual relationship between the appellant and the respondents, within the meaning of the Law of Contract. Section 10 of the Law of Contract Act. [Cap 345, R.E. 2019], provides for elements of a contract. The appellant and his witness did not prove any the elements provided under section 10 of the Law of Contract. She added that the section further provides how to create or make a contract. The appellant did not prove by calling any witness to prove when the alleged oral contract was entered as provided by law.

I will not dwell on the third ground of appeal because the appellant's advocate argued a different ground from the ground he raised in the memorandum of appeal. The appellant's third ground of appeal was that the-

*"3. That the 1st appellate court erred in law and fact for holding that there was no **any contractual relationship between the appellant and the respondents.**" (Emphasis is added)*

He submitted that the first appellate court erred to hold that there was no **any contractual relationship between the appellant and his witness** without giving them an opportunity to hear them. He added that whether there existed a contractual relationship **between the appellant and his witness** was not an issue to be proved before the trial court.

It is obvious that the appellant's advocate argued a ground of appeal different from the one raised in the memorandum of appeal. Between the two grounds of appeal, which are; one, the ground raised in the

memorandum of appeal; and two, the ground of appeal raised during the hearing of appeal, I decided to consider the former. Section 25 (3) of the **Magistrates' Courts Act**, [Cap. 11 R.E. 2019] requires an appeal to lodged by way of a petition and not orally. To accept an oral ground appeal advanced during the submission without prior leave to substitute the third ground of appeal would be to circumvent the clear provisions of the law. Section 25(3) states-

*"(3) Every appeal to the High Court shall be **by way of petition** and shall be filed in the district court from the decision or order in respect of which the appeal is brought:*

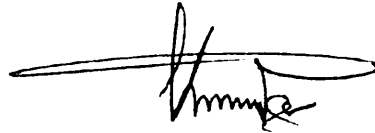
Provided that,....." (Emphasis is added)

It is not disputed that the trial court was called upon to decide whether there was a contract between the appellant and the respondent. The first appellate court had justification to make a finding whether there was **any contractual relationship between the appellant and the respondents**. It is possible that the appellant did not question whether there existed **any contractual relationship between him and the respondents**. That Notwithstanding, the first appellate court had a duty to review the evidence on record and make its own findings if necessary. The first appellate court cannot be faulted for re-appraising the evidence and concluding that there was **any contractual relationship between the appellant and the respondents**. Consequently, I find the third ground of appeal meritless and dismiss it in its entirety.

Eventually, I find the appeal without merit and proceed to dismiss it with costs. I uphold the decision of the district court.

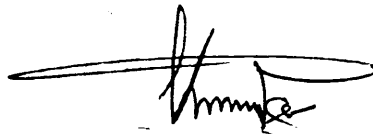
I order accordingly.

DATED this 12th day of April, 2022.



J.R. Kahyoza
JUDGE
12/4/2022

Court: Judgment delivered this 12th day of April, 2022 in the presence of Mr. Fredrick Kakulwa advocate for the respondents also holding Mr. Noel's brief for the appellant. B/C Ms. Martina (RMA) present.



J. R. Kahyoza
JUDGE
12/4/2022