IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MWANZA

AT MWANZA

PC CIVIL APPEAL NO.28 OF 2022

(Originating from the decision of District Court of Kwimba at Ngudu in Civil Appeal No.17 of 2021)

JULIUS MUSSA.....APPLICANT

VERSUS

KULWA JUSTO.....RESPONDENT

JUDGMENT

05th July & 17th August,2022.

Kahyoza, J.

Julius Musa (Julius) sued Kulwa Justo (Kulwa) claiming Tzs. 750,000/= before the primary court. Julius lost. He appealed to the district court and lost, hence, he instituted the instant appeal.

This is a second appeal, which has no mandate to decide on matters not canvassed by the lower courts. Julius, the appellant, is only bound to argue only grounds of appeal which were raised before the first appellate court. See **Simon Godson Macha** (Administrator of the late Godson Macha) v **Mary Kimaro** (Administrator of the late Kesia Zebadayo Tenga) Civil Appeal No 393/2019 **Juma Manjano v R**. Cr. Appeal No. 211/2009, **Sadick Marwa Kisase v. R**. Cr. App. No. 83/2012 and **George Mwanyingili V.** R. Cr. App. No. 335/2016. In **Juma Manjano v R**. the Court held that-

"As a second appeal court, we cannot adjudicate on a matter which was not raised in the first appellate court."

A cursor review of the grounds of appeal reveals that the first, second and third grounds of appeal are new. They were not raised before the first appellate court, as I rule of practice, this second appellate court has no jurisdiction to entertain them. Julius only remains with only two grounds of appeal as follows:-

(a) That, the learned resident magistrate erred in law and fact for failure to re-evaluate the evidence properly, impartially and objectively.

(b) That, the learned senior resident magistrate erred in law and fact for failure to resolve the issue which he had raised to wit, whether the appellant proved his case to the required legal standard.

I will commence with the first-time issue whether the first appellate court erred to re-evaluate the evidence. Julius, the appellant did not elaborate the ground of appeal. On the date fixed for hearing the appellant prayed to be given his right. The respondent duly served did not appear to defend the appeal. I had an opportunity to scan through the judgment of the first appellate court. It does not need a lot of efforts to agree with the appellant that the trial court did not re-evaluate the evidence. The first appellate court said the following:-

"Our case at the prosecution side was made up by the evidence of PW1, ben the appellant in this case, PW2 Abel Mshibe who testified to witness the respondent received a total of five doors to the respondent premises, according to me such evidence was not credible on the total number of the disputed doors been received by the respondent when fended that the doors he repairs were three for a price of 70,000/= when furnished three door with an inclusion of amount, the fact was not challenged/ discredited by the appellant on cross examination and drew the court o inference on such evidence(reference to the case of see ***CYPRIAN A.KIBOGOYO v R*** *Criminal Appeal No. 88 of 2005(both Unreported),the court believed the evidence by the appellant was credible. Such reason is enough to dispose the appeal."*

Being the first appellant with a duty to re-evaluate the evidence the first trial court was required to do more than that. It is trite law that a first appeal is in the form of a rehearing. The first appellate court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own findings of fact, if necessary. See the decisions of the Court of Appeal in **Future Century Ltd v. TANESCO,** Civil Appeal No. 5 of 2009, and **Makubi Dogani v. Ngodongo Maganga,** Civil Appeal No. 78 of 2019 (all unreported). The Court of Appeal held in **Future Century Ltd v. TANESCO,** (supra) that-

"It is part of our jurisprudence that a first appellate court is entitled to re-evaluate the entire evidence adduced at the trial

and subject it to critical scrutiny and arrive at its independent decision."

The undisputed evidence is that the appellant took the respondent a certain number of doors for repair. After repair the respondent was required to sell the doors and obvious give the appellant the sale price. Julius and Kulwa are at logger heads as to the numbers of doors. Julius deposed that he gave Kulwa 5 doors while Kulwa deposed that he received 10 doors from Julius.

Julius and Kulwa agree that after repairing the door, the latter was required to sell them but they differ on the agreed sale price. Julius and his witness deposed that it was agreed that Kulwa after repairied the doors he was to sell the doors at Tzs. 147,000/= each. Kulwa deposed that they agreed that the sale price to be anything not below Tzs. 50,000/=. Julius and Kulwa entered into an oral agreement, which renders it difficult to ascertain its terms.

The issue central to this appeal is whether the appellant proved his case required standard. It is settled law of evidence in civil disputes that he who alleges must prove and he must do so by balance of probability. There is no dispute that Julius took doors for repair to Kulwa. Julius stated categorically that he took 5 doors for repair to Kulwa and that he paid the costs for repairing the doors. Julius stated that the costs of repairing one

door was Tzs. 15,000/=. He contended that he paid Tzs. 75,000/=. He added that he requested Kulwa to sell doors after repair at Tzs.147,000/= each.

Kulwa did not cross examine Julius regarding the number of doors or the reserved selling price of doors after repair. Julius summoned Abel Madube (PW2) who supported the appellant's evidence. He assisted the appellant to take doors off the bajaji (tricycle) to Kulwa's workshop. He witnessed the parties entering into an oral agreed to repair the door at Tzs.15,000/=each and sell the doors at 147,000/= each after repair. He did not mention the number of doors Julius gave Kulwa for repair.

Kulwa asked Abel(PW2) one question, which he answers that "*aliniita nimsaidie kutelemsha milango*". "*He summoned me to help him to off load the door*". Kulwa did not ask Abel (PW2) regarding the number of doors or the amount agreed for repairing and selling doors after repair.

Kulwa's evidence was that Julius took to him 10 doors for repair. He deposed that it was agreed that after repair he should sell each door at Tzs.150,000/=. He deposed that he told Julius that he cannot sell at that proposed price. He testified, further that he sold doors at 70,000/= each. He deducted 60.000/= which was costs of repair and paid Tzs. 50,000/=

to Julius. He told the trial court that he was indebted to the appellant to the tune of Tzs.110,000/=.

I find the respondent's (Kulwa) evidence not persuasive. Kulwa deposed that he received 10 doors and only accounted for 4 doors. He stated that he used one door get pieces of wood to repair three doors. He sold three doors. One wonders what happened for six doors. Kulwa ought to have returned six doors to the owner either repaired or unrepaired. Kulwa's explanation regarding six doors was that (Abel Pw2) collected the doors on the same day in the presence of his (Kulwa's) mother and other tenants. He did not call anyone of them to testify. Kulwa did not cross-examine Abel(Pw2) whether he collected six doors from his workshop.

It is settled that if a party fails to cross-examination on an important disposition that party is taken to have accepted the testimony. So I find Kulwa's testimony that Abel(Pw2) took six doors from him an afterthought. I cannot buy that piece of evidence.

In the end, I find that Kulwa did not account what happened for 10 doors he received from Julius. I find him not a reliable witness. I find Julius and his witness reliable, credible and gave reliable evidence. I found it proved that Kulwa received 5 doors for repair and not ten doors. Not only that but also, I find it proved that Julius and Kulwa agreed that the

cost of repairing one door as Tzs. 15,000/= and that after repair, Kulwa ought to sell each door at Tzs.147,000/= I, further, found it proved that Julius paid Tzs. 75,000/= for repair. It is on record that Kulwa did not ask questions to contradict Julius' evidence or Abel (Pw2)'s evidence. I therefore, find that the appellant proved the case on the balance of probability. I allow the appeal and grant the following reliefs: -

(a) The appellant is entitled to the value of 5 repaired doors at Tzs.735,000/= minus 50,000/= which Kulwa paid to Julius.

(b) Costs of this appeal taxed at Tzs 150,000/=.

It is so ordered accordingly.

DATED at **Mwanza**, this 17th day of August, 2022.

J.R. Kahyoza

Judge

Court: Judgment delivered in the presence of the presence of the parties. Ms. Jackline (RMA) present.

THE HIGH COURT OF TANZANIA
MWANZA

J.R. Kahyoza

Judge

17/08/2022