IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 96 OF 2021

(*Originating from the Judgment and Decree of Kinondoni District Court in Civil Case No 128 of 2020 dated on 26th January, 2021 before Hon. D.D. Mlashani,* ***RM****)*

VICTOR MUTASI..... APPELLANT

VERSUS

CRDB BANK PLC.....RESPONDENT

JUDGMENT

Date of last order: 21/07/2022

Date of Judgment: 26/08/2022

E.E. KAKOLAKI J.

Before the District Court of Kinondoni at Kinondoni in Civil Case No. 128 0f 2020, the appellant herein instituted a suit against the above named respondent, on tort of negligence claiming for the following orders; one, payment of Tsh. 1,500,000 being costs for extra charges incurred in making travel arrangements due to delay caused by the respondent's negligence to perform her duties, general damages to the tune of Tsh. 50,000,000/-, costs of the suit and any other reliefs.

The appellant's claims as garnered from the pleadings are to the effect that, he is the respondent's customer and has been banking with her for a long

time since 2009. He was issued with Tembocard Master Card in which in March, 2013 successfully applied for online transaction services and the first online transaction made on 08/03/2013. It appears in 2017 the appellant was invited to United Kingdom House of Parliament to attend a Westminster Seminar Youth Program, from 14th -16th November 2017 which was to take place at the House of Parliament Westminster-London. In the course of preparations for attendant, the appellant had to pay for accommodation reservation in UK, process UK visa and arrange for flight, thus made online payment using his CRDB MasterCard. Unfortunately, the transaction was unsuccessful despite several attempts and of late, he had to use other ways of payments which caused delay of his departure while seeking for premium Visa services so as to speed up the process something which suffered him unnecessary expenses. Believing that respondent was negligent for failure to perform his duties accordingly, causing him unnecessary expenses, wastage of time, missing part of high-profile workshop that led to loss of economic opportunity and network, loss of knowledge, frustration and mental torture, and upon resistance of the respondent to remedy his grievances through compensation, the appellant filed Civil Case No. 128 of 2020 against the respondent claiming the reliefs as alluded to above.

Appellant's case was made of one witness (PW1) who was the appellant himself and relied on seven (7) exhibits while the defence case based on a single witness (DW1) who tendered one exhibit only. At the end of the trial, the court was convinced that, appellant had failed to prove his case thus dismissed it for want of merits. The appellant is aggrieved with such decision and has demonstrated his grievances through three (3) grounds of appeal going thus:

1. That the learned trial Magistrate erred in law and fact by denying the appellant the right to be heard
2. That the learned trial magistrate erred in law and facts by restraining the appellant from tendering a document during trial without any justifiable reasons.
3. That the learned trial magistrate erred in law and fact by allowing the respondent to adduce evidence on new issues that did not form part of the pleadings.

On the basis of the above grounds, he prayed this Court to allow the appeal, quashed and set aside the judgment and decree of the District Court of Kinondoni with costs and any other reliefs as this Court may deem just and fit to grant.

In the course of hearing of the appeal parties were heard viva voce, as the appellant appeared in person while respondent represented by Mr. Matia Samwel, learned advocate. In this judgment I am intending to address all grounds of appeal if need be. Submitting on the first ground of appeal, in which appellant faults the trial court for denying him right to be heard, he lamented that, during the trial he was denied his right to re -examination even after demanding the same. He referred the Court to page 20 of the typed proceedings exhibiting his complaint. He complained further that, the worst part is that, to a large part the trial court's decision was founded on cross examination part of evidence in which he was denied a right to re-examine. In further view of the appellant, what the court did was in contravention of section 147 (3) of the Evidence Act, [Cap 6 R.E 2019].

Reacting on the first ground of appeal Mr. Matia submitted that, the appellant was not denied of his right to be heard as he was given an opportunity to re-examine the witness but failed to raise any concern instead he closed his case as can rightly be seen at page 21 of the proceedings. Thus, the first ground is incompetent and has to fail the learned counsel stressed.

In his short rejoinder appellant while insisting the Court to be guided with the trial court record when investigating his complaint, he reiterated his submission in chief and maintain his prayers before the court.

I have keenly considered the submission of both parties in light of the available records. Notably right to be heard *audi alteram partem* is a principle of natural justice under common law which has become a fundamental constitution right requiring every litigant to be heard before a decision is made. This right is also enshrined in Article 13(6)(a) of our Constitution of the United Republic of Tanzania, 1977 as amended from time to time. The same right has been overemphasized by the Court of law in our country in a number of cases. For instance, the cases of **Abbas Sheally and Another Vs. Abdul Fazalboy**, Civil Application No 33 of 2002, **Mbeya-Rukwa Auto Parts and Transport Vs. Jestina Mwakyoma** [2003] TLR 251 and **M/S Flycather Safaris Limited Vs. Hon. Minister for Land and Human Settlement Development and AG**, Civil Appeal No. 142 of 2017 (CAT-unreported). In **Mbeya-Rukwa Auto Parts and Transport** (supra) the Court of Appeal had this to say:

> *"In this country, natural justice is not merely a principle of common law, it has become a fundamental constitutional right.*

Article 13(6)(a) includes the right to be heard among the attributes of equality before the law and declares in part:

(a) Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi na Mahakama au chombo kinginecho kinachohusika, basi mtu hyuo atakuwa na haki ya kupewa fulsa ya kusikilizwa kwa ukamilifu…"

In light of the above decision it is a principle of law now that, before any decision is entered against the party to any proceedings before the court or tribunal or authority mandated with duty of determination of his right or fate, such party must be heard first. This principle was emphasized by the Court of Appeal in the case of **Abbas Sherally and Another** (supra) where Mroso, JA (as he then was) had this to say:

"The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified even if the same would have been reached had the party been heard, because the violation is considered to be a breach of the principles of natural justice. For example, in the case of ***General Medical Council Vs. Spackman****, [1943] A.C 627, Lord Wright said:*

"If principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same

decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision."

The above principle of law in ***General Medical Council*** *(supra)* as cited in **Abbas Sherally and Another** (supra) was also followed with approval by the Court of Appeal of Eastern Africa in the case of **Hypolito Cassiano De Souza Vs. Chairman and Members of the Tanga Town Council** [1961] E.A 377 and the Court of Appeal in the case of **DPP Vs. I. Tesha and Another** [1993] TLR 237.

In the present appeal, appellant asserts that, the trial court denied him the right to be heard as during the trial, he was denied of his right to re - examination. Examination of the witness as provided under section 147(1),(2) and(3) of the Evidence Act, [Cap. 06 R.E 2022] entails three processes. **One**, examination in-chief where the witness is examined by the party who called him, **second**, cross-examination where the witness is examined by the adverse party and re-examination. Re-examination is defined under section 146(3) to mean the process of examination of a witness, ***subsequent to the cross examination, by the party who called him***. The right to re- examination is provided under section 147(3)

of the Evidence Act. For appreciation of the appellant's compliant, I find it imperative to cite the provisions section 147(1)-(3) of the said Act which reads:

> *147.-(1) Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling them so desires) re-examined.*
>
> *(2) The examination-in-chief must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.*
> *(3) The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter.*

What is gathered from subsection (1) of the above cited provision is that, when the witness called by the party is examined in chief, has to be subjected to cross examination by the adverse party before he is re-examined, if the party called him so wishes. The law provides further under subsection (2) that, the said cross-examination need not be confined to the facts to which the witness testified on during his examination-in-chief rather can extend to any other facts/matters seeking to injure or shake the case of the party called him or witness's credibility. The only remedy to such party

who called that witness is for him to re-examine his witness so that he can make good the left unclarified, contradictory or uncertain facts by the witness during cross examination stage, the right which the appellant laments to have been denied during the trial of his case.

It is however learnt from the trial court's typed proceedings that, the appellant was self-representing throughout the trial while the respondent enjoyed services of Mr. Charles Lauwo, learned advocate. As alluded to above, the appellant in proving his case called one witness only, who was himself as PW1, who testified in chief before he was subjected to cross examination by Mr. Charles Lauwo, learned advocate. It is common knowledge that, during cross examination any question can be put to the witness outside the evidence adduced in Court during his examination in-chief so as to injure or shake the case of the party calling him or witness's credibility. The interesting question that comes in my mind however, is whether the appellant who was unrepresented party, was entitled to re-examination when testified in Court in support of his case. The answer to this legal quagmire in my firm opinion is yes. I so view as to my understanding as of right and duty to prove his cases in terms of sections 110 and 112 of Evidence Act, the appellant called himself as a witness before

he testified in chief and later on cross examined. So as a party who called himself as a witness was entitled to the right to re-examination as defined under section 146(3) of evidence Act, as such right is accorded to the party who called the witness.

Having settled that position on the appellant's right to re-examination the next question for consideration is whether he was denied such right as asserted. Mr. Matia submitted that, appellant was accorded with that right but failed to exercise it as a result closed his case. My scrutiny of the trial court typed and hand written proceedings which as per the principle of sanctity of record is presumed to be accurate, the same has unearthed and confirmed the appellant's complaint, that he was indeed denied of his right to re-examination contrary to what is submitted by Mr. Matia. For clarity, this is what transpired in court on 14/01/2021 when appellant (PW1) testified, and after been cross examined by the defendant counsel, the excerpt which I quite from pages 20-21 of the typed proceedings:

> *"**XXd by advocate for the defendant:***
> *….I registered first with the first card, when I changed the card I did not registered against exhibits P6 has expired and its PIN has expired.*
> *That is all*

Xd by Court: Nil

Sgd: Mlashani- RM

14/01/2021

Plaintiff: I pray to close my plaintiff case

Court: Plaintiff hearing is marked as disclosed.

Sgd: Mlashani- RM

14/01/2021

What is deciphered from the above excerpt is that, the appellant was not accorded of his right to re-examine the witness he had called though himself. That is so as the record exhibits that, soon after cross examination of the appellant, the trial court had no question of clarification to put to the witness. In that regard the appellant was denied of his right to fair trial which is constituted under the right to be heard.

Now the last question to be asked is what is the effect for such denial of the right to re-examination to the appellant? I think this question need not keep this Court busy unnecessarily as it has already been established that, denial of such right is tantamount to denial of the right to be fair trial constituted under the right to be heard. It is trite law that, denial of the right to be heard vitiates the proceedings even in a situation where the same decision would have been arrived at by the court, had the party been heard on merits for the only one reason that, his natural right to be heard has been negated

before his rights are taken away. This settled legal stance was adumbrated by the Court of Appeal in the case of **M/S Flycather Safaris Limited Vs. Hon. Minister for Land and Human Settlement Development and AG**, Civil Appeal No. 142 of 2017 (CAT-unreported) where the court after being satisfied the decision was arrived at without according the parties with the right to be heard on the issue at contest, before nullifying the proceedings had this to say:

> *"**Failure to accord the parties the right to be heard** on the propriety of the power of attorney in question **denied the parties the right to be heard on the issue** and we are satisfied this **anomaly is fatal and vitiated the proceedings and Ruling**. See, **Dishon John Mtaita Vs. DPP**, Criminal Appeal No. 132 of 2004 and **Scan Tan Tours Ltd Vs. The Registered Trustees of the Catholic Diocese of Mbulu**, Civil Appeal No. 78 of 2012 (all CAT-unreported)" (Emphasis added)*

In this case since it is already established the appellant's right to be heard was violated, its effect is to render the whole proceedings before the District Court of Kinondoni in Civil Case No. 128 of 2020, a nullity regardless of whether the same results would have been reached by the trial court had such right to re-examine been accorded to the appellant. This ground

suffices to dissolve this appeal, thus I see no need of venturing into determination of rest of the grounds as that will only serve academic purpose.

Consequently, this appeal is allowed. The trial court's proceedings in Civil Case No. 128 of 2020 before the District Court of Kinondoni are hereby quashed and its judgment set aside. This has the effect of ordering retrial of the case before another competent magistrate.

No order as to costs.

It is so ordered.

DATED at DAR ES SALAAM this 26th August, 2022.

E. E. KAKOLAKI

JUDGE

26/08/2022.

The Judgment has been delivered at Dar es Salaam today 26th day of August, 2022 in the presence of the appellant in person, Mr. …….. Respondent's principal officer and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI

JUDGE

26/08/2022.