IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

PC CIVIL APPEAL NO. 43 OF 2021

(Arising from the judgment in Civil Appeal No. 12 of 2021 of the District Court of Ilemela at Ilemela, originating from Civil Case No. 43 of 2021 of Ilemela Primary Court dated 20/05/2021)

FIKIRI KASOGA.....APPELLANT

VERSUS

AMANI KABAYU.....RESPONDENT

JUDGEMENT

30/12/2021 & 14/03/2022

F. K. MANYANDA, J.

The Appellant, Fikiri Kasoga, being aggrieved by the judgement of the District Court of Ilemela in its appellate jurisdiction, hereafter referred to as "the first appellate court" by Hon. P. P. Kubaja, Resident Magistrate, dated 08/07/2021 which decided in favour of the Respondent, Amani Kabayu, hereby appeals to this Court on four grounds namely: -

1. *That the first appellate court erred both in law and facts by failure to consider that no contract if no consideration;*

2. *That the first appellate court erred both in law and facts by failure to evaluate the evidence tendered and attestation before the trial court which disproved the Respondent's case;*
3. *That as you evaluate the records you will find that the court failed to deal with the issue of counter claim though it was raised; and*
4. *That as you evaluate the evidence is against the decision reached.*

The background of this matter is that in 2020 the Appellant, a Tanzanian National, and the Respondent, a Congolese, entered into an agreement of dealing with fish business. The Appellant contended that the agreement was in a nature of principal-agent relationship in which the Respondent was to send money to the Appellant in Tanzania, in particular at Mwanza, and the latter purchase fish and sent it to the former in the Democratic Republic of Congo. The Appellant contend further that the Respondent was to pay him commission

On the other hand, the Respondent contend that the agreement was in a nature of a purchaser-seller relationship, which means, the Respondent was to pay money to the Appellant at Mwanza in Tanzania and the Appellant sell the fish to the Respondent in Congo, at a profit.

It turned out that the Respondent paid the Appellant money for purchasing fish, but the Appellant failed to deliver the fish on reason

that he deducted and retained his commission, hence a dispute arose between them. The Respondent filed a civil case at Ilemela Primary Court which decided in his favour. The Appellant unsuccessfully appealed to the District Court of Ilemela which also decided in favour of the Respondent. Undaunted, the Appellant has come to this Court, hence the instant appeal.

At the oral hearing of the appeal, the Appellant was represented by Mr. Arsein Molland, learned Advocate, who also represented him in the first appellate court, the respondent entered appearance in person unrepresented.

Arguing in support of the appeal Mr. Molland grouped the four grounds of appeal into three being ground one and three were argued jointly; the rest were argued seriatim.

Submitting in support of the first and third grounds, Mr. Molland argued that the first appellate court went astray in law and facts for failure to find that it is a requirement of the law of contract that there is no valid contract in absence of consideration. He cited section 25(1) of **the Law of Contract Act,** [Cap 345 R. E. 2019].

Moreover, the Counsel submitted that the Appellant raised a counter claim of Tshs. 3,391,000/= as commission payment. He argued that the counter claim was not controverted at the trial court, hence it didn't see need of conducting a trial within a trial for proof of a counter claim. The Counsel was of the views that under the provisions of the Evidence Act, [Cap 6 R. E. 2019], such a claim is taken to have been admitted.

The Counsel submitted further that the first appellate court wrongly acted on evidence which was not part of the proceedings, it acted on mere afterthought. He was of the views that the first appellate court ought to find that the counter claim was the consideration of the contract.

Regarding the second group which comprise of the second ground of appeal, that the first appellate court errored for failure to evaluate the evidence adduced at the trial court. The Counsel argued that the inconsistence of the figures was resolved. He gave examples that the controversial amount was Tshs. 3,425,000/= but both oral and documentary evidence failed to prove that amount.

In respect of the third ground, the Counsel basically repeated his submissions in the second ground of appeal submitting that the decision of the trial court was not supported by the evidence, hence the first

appellate court failed to evaluate the same. The Counsel was of the views that the first appellate court wrongly based its decision of the counter claim which according to the Counsel had no controversy. Then the Counsel went on analysing what he thought is contradictions in the evidence adduced by the Respondent.

He observed that SU2 mentioned the amount admitted by the Appellant to be Tshs. 4,625,000/=, SM3 did not mention any amount and the Respondent mentioned the same to be Tshs. 4,625,000/= but later on mentioned Tshs. 4,325,000/=.

The Counsel also argued that the evidence disclosed a criminal offence of obtaining money by false pretence. He was of the views that the Respondent ought to have filed criminal complaints to the responsible authorities. He prayed the appeal to be allowed with costs.

On his side, the Respondent opposed the appeal arguing that in ground one and three that there was no issue of commission at the trial and that the Appellant failed to prove any existence of commission agreement.

As regard to treating a counter claim as consideration, the Respondent denied any agreement of commission because their agreement was of a

relationship of a seller and a buyer, the Appellant been a seller and the Respondent a buyer, the profit he was getting was the consideration of their agreement, not commission.

In respect of the second ground, the Respondent submitted that the evidence sufficed to prove the claim. He rejected the issue of criminality of the Appellant arguing that their transaction was a purely contractual in nature. He prayed the appeal to be dismissed in its entirety with costs.

In rejoinder Mr. Molland submitted reiterating his submission in chief and added that there was no issue of seller-buyer relationship between the Appellant and the Respondent. He insisted that there is no contract where there is no consideration.

Those were the submission by the parties, it is my duty now to determine this matter. In the first place, I sincerely register my apology for late delivery of this judgement, the causes of delay were out of my control.

As it can be gleaned from the submissions by the parties, it is not disputed that the Appellant is a Tanzanian National and the Respondent is a Congolese and that the duo involved in an agreement concerning a

business of fish in which the Appellant received some money from the Respondent and in return the Respondent also received some fish. The controversy between them is what type of relation between was all about. The Appellant says it was a principal-agent relationship in which the Respondent was a principal and the Appellant an agent and was to get commission. The Respondent says it was a seller-buyer relationship in which the Appellant was to sell fish to the Respondent and get profit. The trial court accepted the Respondent's position which was also accepted by the first appellate court.

The complaints in the first and third grounds is failure by the first appellate court to find that it is a requirement of the law of contract that there is no valid contract in absence of consideration, failure to find that the controverted counter claim of Tshs. 3,391,000/= was commission and that the first appellate court wrongly acted on evidence which was not part of the proceedings.

In the second and fourth grounds, the complaint is that the first appellate court errored for failure to evaluate the evidence adduced at the trial court which comprise of inconsistencies as far of the contested figures is concerned and criminality of the transaction.

As it can be seen, the complaint is all about misapprehension of evidence and failure to evaluate the same by the first appellate court.

This been a second appellate court can only deal with matters of law or mixed matters of law and facts. However, it can interfere with the concurrent findings by two courts below it, only if their decisions are clearly wrong, unreasonable or are a result of a complete misapprehension of the substance, nature or non-direction on the evidence or where those courts violated some principle of law or procedure which has an effect of occasioning miscarriage of justice.

This was the holding of the Court of Appeal in the case of **Emmanuel S.O Samson vs The Director of Public Prosecutions,** Criminal Appeal No.264 of 2018 (unreported) where it stated as follows: -

> *"This Court as the second appellate court is entitled to interfere with the concurrent findings by two courts below it, only if their decisions are clearly wrong, unreasonable or are a result of a complete misapprehension of the substance, nature or non-direction on the evidence or where those courts violated some principle of law or procedure which has an effect of occasioning miscarriage of justice."*

The Court of Appeal followed its earlier decisions in the cases of **Director of Public Prosecutions vs. Jaffari Mfaume Kawawa,** [1981] TLR 149; **Mussa Mwaikunda vs. Republic,** [2006] TLR 387; **Wankuru Mwita vs. Republic,** Criminal Appeal No. 219 of 2012 and **Omary Lugiko Ndaki v. Republic,** Criminal Appeal No. 544 of 2015 (unreported).

In the case of **Wankuru Mwita,** the Court of Appeal observed as follows: -

> *"... The law is well-settled that on second appeal the Court will not readily disturb concurrent findings of facts by the trial court and first appellate court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature or non-direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice."*

The principles cited above though were spelt in criminal cases, still the principles in them apply in civil cases as well. For instance, in the case of **Godfrey Chilongola vs. Nicodemus Martine and 19 Others,** Land Case Appeal No. 29 of 2018 (unreported), this Court, Hon. Mruma, Judge, applying the principle in a civil case stated as follows: -

"This being a second appeal, this court is not required to re-evaluate the evidence. That is a duty of the first appellate court which must review the evidence and consider the material before the trial court (See ***Pandya Versus R*** *[1957] E.A. 336 and* ***Okena Versus Republic*** *[1972] E.A 32). The second appellate court has no duty to re-evaluate the evidence adduced at the trial but it has the duty to consider the facts of the appeal to the extent of considering the relevant points of law or mixed law and facts as raised in the second appeal. In the process it may review the evidence (i.e. facts) adduced at the trial and particularly so if the first appellate court failed to discharge its primary obligation to rehear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion."*

The question in this appeal is whether there is misapprehension of the substance, nature or non-direction on the evidence by the two lower courts. To get an answer to this question, this Court will have to enter into the shoes of the first appellate court and reappraise the evidence and may come up with a conclusion not necessarily the same as the lower courts.

Reappraisal of evidence entails three stages: - first it is recapturing briefly the description of the facts constituting the evidence subject of

the analysis; second analysis of evidence by considering whether such evidence, if it is from the appellant, whether it supports the claims and if it is from the respondent, whether it rebuts the said claims; and third, it entails giving reasons for such evidence to be believable or not.

In this matter the evidence lead by the Respondent in the trial court may be summarized that he had an oral agreement with the Appellant of buying fish from him. In the course of conducting their business the Respondent was informed through telephone by the Appellant, with whom they knew each other from previous fish business transactions, about plenty availability of fish at Mwanza. As a result, he sent Tshs. 6,019,500/= to the Appellant for buying fish. In turn, the Appellant sent to him fish valued at Tshs. 2,594,500/= only, thereby remaining with Tshs. 3,425,000/=. The Appellant failed to deliver the fish for the said remaining money and lied when the Respondent inquired, thereby necessitated him (Respondent) travel to Mwanza for follow up. The Appellant admitted the debt and promised to repay but later on refused.

On cross examination by the Appellant, he insisted that they were engaged in an agreement of a business of selling and buying fish. When replying to questions put to him by the trial court assessors, the Respondent stated that at the reconciliation before the fishmarket

leaders the Appellant admitted the debt and promised to repay Tshs. 397,000/=. He tendered Exhibit P-a, b and c.

Two witnesses were summoned in support of the Respondent namely, SM1 Misonganago Amike and SM2 Serge Chiselero, both stated that the Appellant admitted the debt.

In his defence, the Appellant stated that in January, 2020, he entered into an agreement with the Respondent of purchasing fish for him on commission of Tshs. 1,000 for each fish. Since then, he received a total of Tshs. 32,809,400 and bought 3200 pieces of fish for Tshs. 29,509,400. The Appellant stated further that the Respondent refused to pay him the commission of Tshs. 3,391,000/=, therefore, he too retained that money as his commission. He clarified that Tshs. 100,000/= was for payment of loaders and was ready to repay Tshs. 91,000/= only. He tendered Exhibit D1 being records he prepared and kept.

On cross examination by the Respondent, he admitted a debt of Tshs. 91,000/=. In response to questions put to him by the trial court assessors, replied that he deducted Tshs. 3,200,000/= as commission being Tshs. 1,000/= for each piece of fish because he sold the fish without deducting his commission. He further stated that there was no

any witness when they entered into their oral agreement in January, 2020.

Two witnesses were summoned to support the Appellant namely, SU2 Kaonga Bashwele and SU3 Mande Gamanywa who testified that the Appellant received money from the Respondent, SU2 stated in response to questions put to him by the trial court assessors that he knew the Appellant and the Respondent were in agreement of doing a business of fish.

As it can be seen, the evidence in this matter is straight. As stated above, the duo involved in an agreement concerning a business of fish in which the Appellant received money from the Respondent and in return the Respondent also received fish however, the Appellant retained Tshs 3,200,000/= which he claims to be his commission.

The Respondent testimony is that the remaining money which is retained by the Appellant after refusing to deliver fish is Tshs. 3,425,000/=. The controversy between them is therefore on the terms of the contract they entered. The Appellant says it was a principal-agent business, the Respondent says it was a seller-buyer business.

The Counsel for the Appellant submitted that there is no contract without consideration. Yes, I agree that is the position of the law of contract as provided under section 25(1) of the Law of Contract Act, [Cap. 345 R. E. 2019] which reads as follows: -

"25(1) An agreement made without consideration is void .."

The Counsel stated so because he meant that the Appellant deserves commission payment, a claim he contends that was raised as counter claim in the trial court. In my considered opinion the issue is not lack of consideration but on the terms of their contractual relationship. I say so because, in the relationship of principal-agent, commission is the consideration and in seller-buyer relationship, price is the consideration as per Section 3(1) of the Sale of Goods Act, [Cap. 214 R. E. 2019] which provides as follows: -

> *"3(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called price, and there may be a contract of sale between on part owner and another."*

In determining the relationship, I will look at the evidence presented by the parties. The Appellant stated in response to the questions put to him

by the trial court that they entered into their contract orally and in absence of any witness other than the two only.

It is trite law that a contract can either be oral or written, for instance the Sales of Goods Act puts it clear that a sale contract may be made orally or in writing. Section 5(1) of the Sale of Goods Act reads as follows: -

> *"5(1) Subject to the provisions of this Act and of any other written law in that behalf, a contract of sale may be made in writing (either with or without seal) or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties."*

The evidence shows that the Appellant and the Respondent entered into their oral contract since 2020 and sold fish to the Appellant. When responding to a question put to him by the 2nd Assessor, the Appellant stated at page 11 of the typed proceedings, as follows: -

> *"Nikauza samaki bila kukata faida yangu."*

Literally means that he sold fish to the Respondent without deducting his profit.

This answer when taken together with the response of the Appellant to the cross-examination questions put by the Respondent, at page 5 of

the typed proceedings, which states that they were dealing in a business of selling and buying fish *"tulikuwa tunanunuliana samaki"* makes me believe that the terms of their agreement was for selling and buying fish.

In such terms, as stated above, the consideration was the selling price which was within the Appellant's knowledge. The evidence by the Respondent is that he just sent money to the Appellant and in turn the Appellant sold the fish to him at a price which afforded the Appellant profit; which was the consideration of their contract.

The fact that the Appellant forgot to deduct his profit is not supported by the evidence on the following reasons.

One, there were previous transactions in which there was no any dispute between them.

Second, there is no evidence explaining how the Appellant did conduct the business since January 2020 to 31/03/2021 without demanding his commission, if at all it was among of their agreement terms, a fact which positively implies that the Appellant paid himself from the profit of the business as testified by the Respondent.

Third, the evidence by the Respondent that the Appellant lied when delivery of fish stopped until he made a follow up that the Appellant raised a question of commission. Moreover, the fact of lying was not cross examined by the Appellant, which means he admitted.

In law failure to cross examine on an incriminating fact amounts into admission. In the case of **Hatari Masharubu @ Babu Ayubu vs Republic**, Criminal Appeal No.590 of 2017 (unreported) the Court of Appeal of Tanzania stated this principle of law as follows: -

> *"It must be made clear that failure to cross examine a witness on a very crucial matter entitles the court to draw an inference that the opposite party agrees to what is said by that witness in relation to the relevant fact in issue."*

In **Damian Ruhele vs. Republic**, Criminal Appeal No.501 of 2009 (unreported), the Court of Appeal of Tanzania made reference to its earlier decision in **Cyprian Athanas Kibogo vs. Republic,** Criminal Appeal No.88 of 1992 (unreported), where it was plainly stated that it is trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness's evidence.

Although the authorities in the cited cases above were pronounced in criminal cases, the principles apply in civil cases as well.

Another complaint in grounds one and three levelled against the decision of the first appellate court is that the trial court was right for not conduction a trial within a trial on a counter claim because it was not controverted by the Respondent and that it wrongly acted on facts which were not part of evidence on record.

My thorough perusal of the evidence as captured and analyzed above, have failed to find admission of any counter claim. I have equally navigated through the judgements of the trial court and the first appellate court, there is nowhere an issue of a counter claim was raised and discussed. The Appellant simply stated that he retained the money as commission, the lower courts rightly found that there was no commission agreement; but they found that the Appellant ought to repay the money to the Respondent after failing to deliver the fish.

This Court has found the same, I don't see any reason for interfering with the concurrent findings of the lower courts. In the result I find grounds one and three lacking merit.

I will deal with the complaints in the second and fourth grounds as they are similar that the first appellate court failed to evaluate the evidence adduced at the trial court and resolve the inconsistence of the amount of money of Tshs. 3,425,000/= while both oral and documentary evidence failed to prove that amount. I have perused the judgement of the first appellate court and my finding is that the same correctly evaluated the evidence. The first appellate court, at page 6 of the judgement, raised an issue which reads as follows: -

> *"An argument now which attracts an attention to this court, is in respect of whether such Tshs. 3,425,000/= was retained as his commission/dividend/payment and therefore consideration of their contract."*

Then, it went on analyzing the evidence adduced by both sides on proof of the said figure and reached to a conclusion as follows: -

> *"On the same domain, since no proof was again given in court by the respondent in respect of other losses alleged to have been suffered by the Respondent following the non-payment of Tshs. 3,425,000/= therefore, the appeal is dismissed with minor variation, that the appellant herein Fikiri Kasoga to pay herein Amani Kabayu instead of Tshs. 3,975,000/= which was earlier on ordered by the trial court."*

The Counsel for the Appellant argues that the Respondent failed to prove the amount owed by the Appellant because he stated a different amount of Tshs. 3,425,000/=, SU2 stated that the Appellant admitted amount of Tshs. 4,625,000/=, the Respondent mentioned amount of Tshs. 4,625,000/= but later changed to Tshs. 4,325,000/=.

I have perused the evidence adduced by the Respondent before the trial court and found that in the hand written version of the proceedings the amount which the Respondent mentioned was recorded both in words and in figures. The amount in words is Tanzanian Shillings Three Million Four Hundred Twenty-Five Thousand only, which in figure is Tshs. 3, 425,000/=. In my firm opinion this is the amount the Respondent proved; it is the same amount the first appellate court held to be the amount which the Appellant owes the Respondent. There is no error.

The Counsel also submitted that since the evidence adduced revealed a criminal offence of obtaining money by false pretences, then this matter ought to be dealt as a criminal case rather than civil case. This argument should not detain me, it is trite law that a criminal case is not the same as a civil case because the issues are different and the standard of proof differs. Moreover, in both lower courts there was no issue of criminality of the Appellant's conducts, it is an afterthought.

Ground two and four also lack merit.

In the result, it is the finding of this Court that the appeal is non-meritorious.

Consequently, I do hereby dismiss the same in its entirety with costs. The judgement of the District Court of Ilemela in its appellate jurisdiction stands. It is so ordered.

F. K. MANYANDA

JUDGE

14/03/2022