

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA**

CIVIL APPEAL NO. 38 OF 2021

(C/f Civil Case No 9 of 2019 before the District Court of Karatu at Karatu)

DR. LAURI COSTELLO APPELLANT

VERSUS

DR. STEPHANO LAZARO BADYNA RESPONDENT

JUDGMENT

05/07/2022 & 13/09/2022

KAMUZORA, J.

The Appellant Dr. Lauri Costello being dissatisfied with the judgment and decree of the District Court of Karatu at Karatu (the trial Court) brought this appeal to this court against Dr. Stephano Lazaro Badya the Respondent herein. The brief history as gleaned from the records are that, the Appellant sued the Respondent at the trial court praying for a declaration order that the defendant fraudulently obtained from the plaintiff United State Dollars 35,000. She also prayed that the defendant (Respondent herein) be ordered to refund the said amount to the plaintiff (Appellant herein) together with interest, general and

punitive damage as well as the costs of the suit. The trial court upon a full hearing of the matter dismissed the Appellant's claim. Being dissatisfied with the trial court's decision the Appellant preferred an appeal to this court and three grounds of appeal were advanced as follows: -

- 1) That, the trial magistrate failed to judiciously and fairly analyse the evidence that was before him and as a result he dismissed the Appellant's suit.*
- 2) That, the trial court's judgment falls short of a standard judgment of a court of law.*
- 3) That, in his determination of the dispute between the parties herein, the trial magistrate considered extraneous matters that had no bearing to the framed issues.*

Following those grounds, the Appellant prays to this court to allow the appeal and grant the reliefs prayed in the plaint. As a matter of legal representation, the Appellant was ably represented by Advocate Rodgers Godfrey Mlacha while the Respondent enjoyed the service of advocate Felichismi Baraka. Hearing of the appeal was by way of written submissions and both parties complied to the submissions schedule.

Submitting for the 1st ground of appeal, the counsel for the Appellant pointed out that, the court system is adversarial where cases are determined only on strength of evidence adduced by the parties and

that, court adjudicate on matter in dispute which parties themselves have raised by their pleadings. To cement on this, he cited the case of **Juma Hussein Vs. the Republic**, Misc. Criminal Case No 18 of 2020 (unreported), **Barclays Bank (T) LTD Vs. Jacob Muro**, Civil Appeal No 357 of 209 (Unreported).

Referring to paragraph 7 of the plaint, the counsel for the Appellant argued that, the Appellant sued the Respondent on the basis that the Respondent by exploiting her propensity and vulnerability for charitable giving, and by using a sham charitable clinic as his umbrella, obtained from him, USD 35,000/=. That, at paragraphs 3,4 and 5 of the Written Statement of Defence the Respondent categorically admitted that the Appellant is an outstanding Philanthropist and the Respondent admitted receiving USD 35,000/= but contended that the same was given for his personal use. That, from the parties' pleadings the fact that the Appellant was a Philanthropist and that the Respondent had received USD 35,000/= from the Appellant was not an issue.

The counsel went on and narrated the evidence adduced at the trial court and added that, the Appellant and PW2 were not cross-examined on the contents of exhibits P1, P2, P3 and P4 which implies that the Respondent admitted the contents of the respective exhibits. He

supported his argument with the case of **Bomu Mohamedi Vs. Hamisi Amiri**, Civil Appeal No. 9 of 2018.

Regarding the evidence adduced by the Respondent at the trial court, the counsel for the Appellant stated that, under paragraph 5 of the Written Statement of Defence the Respondent stated that he was given the money for his personal use. When the Respondent adduced evidence, he stated on how he used the money and created the variance hence his evidence be ignored. The counsel was of the view that the first issue framed by the trial court ought to be answered in affirmative as the evidence on record establishes that the Respondent made a false representation that he had set up a charitable clinic in Tabora and a result of that representation he obtained USD 35,000/= from the Appellant.

The counsel added that, since this is the first appeal, the court is entitled to re-evaluate the entire evidence and subject it to critical scrutiny and arrive at an independent decision. Reference was made to the case of **The Registered trustees of Joy in the Harvest Vs. Hamza K Sungura**, Civil Appeal No 149 of 2017 (Unreported).

Submitting for the 2nd ground of appeal, the counsel for the Appellant argued that, the trial court judgment does not contain the

statement of the case and it is also silence on the closing submissions filed by the Appellant with the leave of the court. The counsel considers the judgment of the trial court to be arbitrary and prayed the same to be quashed and set aside. In support of this argument, he cited the case of **Caritas Tanzania and Another Vs. Steward Mkawa** [1996] TLR 239, **Tanzania Breweries Limited Vs. Anthony Nyingi** [2016] TLS LR 99.

Submitting for the 3rd ground the counsel stated that, the court had to determine the dispute on the strength of evidence placed before it. That, reading page 2 of the trial court decision one of the factors that influenced the decision of the trial court is the absence of an agreement between the parties and the lack of consideration. He referred such reasoning as extraneous matter and its determination by the trial court was uncalled. That, the trial magistrate was also influenced by his fear of God and unproved friendship between the Appellant and the Respondent as seen under page 3 paragraph 3 of the trial courts judgment. The counsel for the Appellant prays that the appeal be allowed with costs.

The counsel for the Respondent response to the 1st ground of appeal is that, there is no sound reasons or arguments from the

Appellants submission that justify the assertion that the trial magistrate did not fairly and judiciously analyse evidence on record. That, in case this court accepts the 1st ground of appeal, the Respondent argued that the court has to re-evaluate the entire evidence on record and arrive at its decision. He supported his position with the case of **The Registered Trustees of Joy in the Harvest Vs. Hamza K. Sungura**, Civil Appeal No. 149 of 2017.

The Respondent's counsel went on and submitted that, the Appellant offended the holding in the case of **Joseph Chale Vs. Mariam Abdallah Kimaro & 2 others**, Land case No. 229/2016 for failure to disclose particular items of fraud contrary to Order VI Rule 14 and 15 of the Civil Procedure Code. That, the Appellant's Plea suggests that it was signed in Arusha on 12/11/2019 and when cross-examined the Appellant stated that on that material date, she was not in Arusha but in Colorado hence the Appellant failed to prove his case at the trial court. To cement on his submission, he cited the case of **Twazihirwa Abraham Mgema Vs. James Christian Basil (As Administrator of the Estate of the late Christian Basil Kiria, deceased)**, Civil Appeal No 229/2018 CAT Dar es Salaam (Unreported).

The Respondent added that, the basis for the Appellant to send the money to the Respondent was the desire to support the Respondent financially as justified by the Appellant's email to the Respondent dated 24/1/2019. That, even the evidence on record referring pages 17, 20, 27 and 28 reveals that the Appellant was only assisting the Respondent. That, the Appellant presented herself as a donor and donation is not required to be returned. The Respondent maintained that, the Appellant failed to prove at the trial court that she was entitled to the reliefs sought.

Responding to the 2nd ground of appeal, the counsel for the Respondent admitted to have noticed the omission in the trial court's judgment as it did not reflect the statement of the case and the magistrate did not consider the Appellants final submission. He however insisted that, since the parties were heard viva voce by the same magistrate who composed the verdict then the omission did not in any way prejudice the Appellant.

Responding to the third ground of appeal, it is the submission by the counsel for the Respondent that, whether there was a binding agreement was a matter raised by way of a defence by DW1 at page 29. That, the issue as to whether the Appellant and the Respondent were

friends can be reasonably referred in the evidence adduced by the parties. He maintained that, one cannot make a conclusion that the Respondent fraudulently obtained USD. 35,000 from the Appellant hence the Respondent cannot be compelled to return the said amount of money.

In rejoinder submission by the Appellants counsel, the submission in chief was adopted and he added that, the argument that the Appellant's claim at the trial court offended Order VI Rule 4, 14 and 15 of the Civil Procedure Code Cap 33 R.E 2019 is unfounded as the plaint provides the particulars of fraud, misrepresentation and undue influence as required by the law. Referring exhibit P2 and P4 the counsel for the Appellant argued that, the clinic was the only reason that led the Appellant to wire money to the Respondent and there was no evidence to support that the Appellant wired money to the Respondent for his personal use. Re-joining on the second ground of appeal the counsel added that, the trial courts judgment is not a proper judgment for the law and hence prays that the appeal be upheld.

I have considered the arguments by the parties and evidence in records. I will start my deliberation on the second ground in which the Appellant is faulting the trial court's judgment for not containing the

essential ingredients. It is the claim by the Appellant that the judgment of the trial court fails short of a standard of a judgment of a court of law. The same has been conceded by the Respondent's counsel who admitted to have noticed the omission to analyse the statement of the case and failure to consider the Appellant's final submission.

A judgment or ruling is a legal document whose composition is guided by the law. Order XX Rule 4 of the Civil Procedure Code Cap 33 R. E 2019 states that,

*"A judgment shall contain a **concise statement of the case**, the points for determination, the decision thereon and the reasons for such decision."* (Emphasis mine).

The Court of Appeal of Tanzania in the case of **Anurali Ismail Vs. Regina** 1 TLR 370 Abernethy J, made some observations on the requirements of the judgment by holding that: -

"A good judgment is clear, systematic, and straightforward. Every judgment should state the facts of the case, establishing each fact by reference to the particular evidence by which it is supported, and it should give sufficiently and plainly the reasons which justify the finding, it should state sufficient particulars to enable a court of appeal to know what facts are found and how."

Similarly, in the case of **Hamis Rajabu Dibagula Vs. R**, [2004]

T.L.R. 196 the Court of Appeal held that,

"A judgement must convey some indication that the judge or magistrate has applied his mind to the evidence on the record. Though it may be reduced to a minimum, it must show that no material portion of the evidence laid before the court has been ignored. A good judgement is clear, systematic and straight forward. Every judgement should state the facts of the case, establishing each fact by reference to the particular evidence by which it is supported and it should give sufficiently and plainly the reasons which justify the finding. It should state sufficiently particulars to enable a court of appeal to know what facts are found and how."

It is a true fact that, every Magistrate or judge has his/her own style of composing judgment but what vitally matters is that, the essential ingredients should be there and these includes; clear and concise statement of the case, points for determination, critical analysis of both the prosecution and defence evidence, the decision thereon and the reasons for such decision.

For a clear follow up I will briefly demonstrate the contents of judgment of the trial court found in Civil Case No. 9 of 2019 which is subject to the present appeal. The judgment contains three pages in

which at page 1 to 2 there is a list of prayers sought by the plaintiff as reflected in the plaint followed by alternative prayers by the defendant which was drawn from the Written Statement of Defence and two issues for determination. From page 2 to 3 there is a brief decision of the court which reads: -

"Without wastage of time, according to the evidence of both parties in this dispute of USD 35,000 which the plaintiff gave defendant, no dispute the defendant was received USD 35,000 from the plaintiff. The defendant agrees on this. Second, documentary evidence of the plaintiff's side which is a total of six exhibits which marked as P1 to P6 are only communication by email among plaintiff and the defendant.

I pass carefully through all emails NO any of the email which show any term and condition, NO any clause, NO any consideration, here the law is clear for any contract to be binding there must be a consideration. Absent of all above make that money to be aid and AID always in NOT subject to REFUND"

I agree with the defendant that the plaintiff gave aid to him in order to run life; for example, when you look email for plaintiff to defendant of 28th February 2019 of at 4:22 PM which is an exhibit of the defence side which marked exhibit D1 collectively, let me quote the last line of paragraph two.

".....i am willing to do it because I believe in you and want to see you succeed"

End of quotation.

When you pass through the emails of both parties here, I mean emails of the plaintiff and of the defendant, these two are the best friends I don't know where the devil come and entered in between them and cause this conflict among of them.

Evidences of both parties let fear in GOD, the plaintiff had an intention to aid the defendant and AID I repeat is not subject to REFUND. No any sign of obtaining money by fraudulently.

Therefore, this suit have no legal bases, for this reason I dismiss this claim.

No cost ordered because these (plaintiff and Defendant) are friends, I think there is a person who do not have fear of God who misleading them.

With the above judgment, apart from reference to the exhibits tendered, no reference to the facts behind that claim, the evidence by witnesses either proving or disproving the claims, no reasoning by the trial magistrate referring the evidence by witnesses if they worthy consideration or not. In short, the judgment is not clear, systematic, and or straightforward as it was insisted in the above cited case **Anurali Ismail** (supra). In fact, the trial court's judgment violates the legal requirement under Order XX Rule 4 of the Civil Procedure Code Cap. 33 R. E 2019 by not even stating the concise statement of the case. The magistrate did not assess facts by referring particular evidence to which

it is supported and no sufficient and plain reasons which justify the finding. Much more, the records show that, the Appellant prayed to file final submission and an order was issued and complied with. It is unfortunate that by the above judgment, the Appellant's submission was not considered and no reasons were given for that failure.

It is my view that, the trial court's judgment falls short of a standard judgment of a court of law for lack of essential ingredients of a judgment. Apart from lack of concise statement of facts of the case, the trial magistrate failed to judiciously and fairly analyse the evidence that was before him. I also agree with the Appellant's argument that, instead of determining the dispute between the parties, the trial magistrate considered extraneous matters that had no bearing to the framed issues.

The trial magistrate considered lack of agreement or consideration which was not an issue for determination before him and inverted the spiritual belief that, someone with no fear of GOD have misled the parties who seem to be friends, the matter which was also not an issue before him. Whether the Respondent raised in defence that there was no contract between them, still that was not an issue that was raised for determination before the trial court.

I understand that in course of determining the suit, the court can raise issue suo moto for purpose of proper determination of the rights of the parties. But in this case the trial magistrate only brought up matters on contract and consideration without even explaining thoroughly why those matters were of importance for the same to be brought up by the court in its determination.

In considering the above discussion, I find that the the trial court's judgment is short of blatant abdication in the magistrate's noble duty. The above pointed inconsistencies cannot be considered as a mere slip. It is an intolerable omission which is a serious travesty of the law which borders on an epic miscarriage of justice. The inconsistency makes the whole judgment of the trial court to be invalid.

It was argued by the counsel for the Appellant under the first and third ground of appeal that, as the trial magistrate failed to analyse the evidence this court should step into his shoes and make the analysis of evidence and come into an independent decision. I agree that the first appellate court can re-evaluate the entire evidence and subject it to critical scrutiny and arrive at an independent decision. The case of **The Registered trustees of Joy in the Harvest (supra)** cited by the counsel for the Appellant is relevant. However, I am of the view that,

this can only be done where there is valid judgment complying to the legal requirement.


It is a jurisprudential position of the law that a trial court or tribunal is duty bound to evaluate evidence of each witness and their credibility and make a finding on the contested facts in issue. This position has been well articulated in the case of **Martha Wejja Vs. Attorney General and Another** [1982] TLR 35; and the case of **Stanslaus Rugaba Kasusula and Attorney General Vs. Falesi Kabuye** [1982] TLR 388. In the present matter, the referred judgment is invalid for non-compliance to legal requirements. The trial court skipped its duty and this court cannot step into its shoes by re-writing the judgment of the trial court as that will be beyond the duty of the first appellate court envisaged by the above authority, **The Registered trustees of Joy in the Harvest (supra)**.

I therefore find merit in this appeal and proceed to nullify the judgment of the trial court. I order the case file to be remitted back to the trial court for another magistrate with competent jurisdiction to compose a judgment in compliance with legal requirements. The appeal is therefore allowed but in considering that the determination of this

appeal was based on substantial errors committed by the trial court no order for costs is issued.

DATED at **ARUSHA** this 13th day of September, 2022




D.C. KAMUZORA

JUDGE