IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

PC CIVIL APPEAL NO. 50 OF 2022

(Arising from Civil Appeal No. 23 of 2021 of Geita District Court, originated from Civil Case No. 21 of 2021 at Bugando Primary Court)

WILLIAM MCHEZELA---------- APPELLANT

VERSUS

MATAYO JACKSON---------- RESPONDENT

JUDGMENT

Last Order: 22.09.2022
Judgement Date: 27.09.2022

MASSAM, J.

The appellant in this appeal is appealing against the decision of the District Court of Geita at Geita in Civil Appeal No. 23 of 2021 which was decided in favour of the respondent. Briefly, it goes that, the appellant instituted a civil suit before Bugando Primary Court, claiming from the respondent a sum of Tshs. 300,000/= being the money advanced to the respondent for procuring a car battery. The trial court awarded the sum of Tshs. 130,000/= as the sum of money to be paid to the appellant as defendant agreed to be given Tshs 250,000/=. The appellant did not see justice and appealed to the District Court of Geita at Geita whereas, the

first appellate court upheld the decision of the trial court. Still aggrieved, the appellant has now appealed before this court with two grounds of appeal as follows: -

1. That the first appellate court erred in law and in fact for failure to consider the appellant's evidence on record.
2. That the first appellate court erred in law and in fact for failure to order the payment of the amount advanced to the respondent at a tune of Tshs. 300000/= and confirmed the payment of 130,000/= as the payment of the whole sum.

When the matter was called for hearing the appellant had the service of Mr. Musa Mihayo advocate while the respondent afforded the service of Ms. Stella Sangawe learned counsel.

Submitting first, the appellant learned counsel prays to submit the grounds of appeal jointly. He submitted that, the District Court of Geita erred in dismissing the appeal. Referring to pages 5 and 6 of the trial court's typed proceedings, he avers that the respondent admitted to have received from the appellant a sum of Tshs. 250,000/= then the court was supposed to give judgment on admission. He went on that, the trial court erred when it ordered the respondent to pay a sum of Tshs. 130,000/=, while the appellant had already admitted to receive, from the appellant a sum of Tshs. 250,000/=. Insisting the same, he referred this court to the

case of **Jamila Salehe vs Lukas Hungu Mziray and Musa Issa Haji**, Land Appeal No. 34 of 2020, where at pages 3 to 5 it was held that, where the defendant admit the claim, he is not allowed to object it later on.

He went on that, there was no evidence tendered to prove that, the appellant stayed with the battery for more than three months and it is not reflected in the trial court proceedings. He, also submitted that, there was no any exhibit tendered to prove that payment was done, so he submitted that, the trial court was required to follow the principle of he who alleges must prove. Lastly, he stated that failure in doing so is against section 110(1) of Tanzania Evidence Act, Cap 6 R.E 2019. So, he asks himself where did that magistrate got that facts. He retires and prays the appeal to be allowed and the respondent be ordered to pay the appellant the claimed amount.

Responding to the appellant's submissions, Ms. Stela Sangawe learned counsel for the respondent conceded with the appellant's learned counsel insisting that, the trial court did not weigh the evidence on record. The duty of this court is to make sure that, parties bring evidence which can prove his/her case. For the sake of justice, she prays the appeal to be struck out and nullify the proceedings, judgment and orders of both the trial court and the first appellate court.

I have considered the argument for and against, for the both learned counsels, the central issue for determination is **whether the appeal has merit.**

From the record, but in a nutshell, it is clear evident that, the appellant and the respondent had conducted a business transaction and it is not disputed that the appellant paid an advance to the respondent who also admitted the same. What is disputed, is the amount advanced by the appellant to the respondent and the evidence given before the trial court as against the judgment of the trial court.

Indeed, I am mindful with the settled principle that, it is very rare for a second appellate court to interfere with concurrent findings of facts by two courts below unless there is a misapprehension of the evidence, a miscarriage of justice or a violation of some principle of law or practice. In the case of **Julius Josephat v. The Republic**, Criminal Appeal No. 03 of 2017, the Court of Appeal stated that:

> *"...it is the practice that in a second appeal, the Court should very sparingly depart from the concurrent findings of fact by the trial court and the first appellate court. In exceptional circumstances, it may nevertheless interfere as such only when it is clearly shown that there has been a misapprehension of the evidence, a miscarriage of justice or*

violation of some principles of law or procedure by the courts below."

Admittedly, as stated by both learned counsels, the trial court erred in the evaluation of the evidence. On the trial court records, specifically on page 5 the respondent admitted to receive from the appellant Tshs. 250,000/= where the record reads: -

"Ilikuwa mwezi agosti 2020 mdai aliniita na kuniomba nimtafutie Betri N100 Na nilimwambia anipe advance na alitoa pesa advance 100000/-...aliniongezea Tshs. 80,000/- na baadae akaniongezea 70,000/=. Aliitumia hiyo betri na baada ya siku 14 alinipigia simu na kuniambia betri ni mbovu...Mdai aliipeleka hiyo betri nyumbani..."

Again, on page 6 of the trial court proceedings when the respondent was cross-examined by the court, he had this to say: -

"Alimpa pesa Tshs. 250,000/=
Mimi nakubali deni la betri ndogo ya shilingi 130,000/=
Betri niliuza kama screpa 17,000/=
Betri ile alikaa nayo miezi mitatu"

The evidence on record contradicts what was the findings of the trial magistrate on his judgment. First, there is no reasons why the respondent admitted to have received a total of Tshs. 250,000/= from the appellant who returned the battery for being defective and why the court ordered him to pay 130,000/=, which is the amount the respondent claimed to have bought the second battery which also happened to be defective. In

this regard, the trial court failed to analyse the evidence on record to determine what was admitted by the respondent and what was to be awarded to the appellant.

Secondly, the respondent testified that after the appellant received the battery, he called him in 14 days' time informing him that the battery was defective and he returned the same. It is on page 6 where, when cross examined by the court, the respondent responded that, the appellant stayed with the battery for three months contradicting his earlier evidence. For that reason, I find that it was not proper for the two courts below to act on the contradictory evidence as a point of the determination of the matter.

Thirdly, I agree with the appellant's learned counsel that, as it is not disclosed on the evidence which battery the respondent testified that the appellant used it for three months, it was not proper for the court to rely on that evidence as a point of its determination.

Had it may, the law is settled that judgment of the court shall come from the evidence adduced by parties at the trial and it must contain points for determination, the decision and reasons for the decision, which the trial court judgment lacks.

As stated in **Ismail Rashid vs. Mariam Msati,** Civil Appeal No. 75 of 2015 (CAT-Dar es Salaam)

"We wish to reiterate what we stated in SHEMSA KHALIFA AND TWO OTHERS vs. SULEMAN HAMED, CIVIL APPEAL NO. 82 of 2012 that, it is trite law that judgment of any court must be grounded on the evidence properly adduced during trial otherwise it is not a decision at all. As the decision of the High Court is grounded on improper evidence, such a decision is a nullity".

(see also; **Michael Joseph vs Republic** Criminal Appeal No.506 of 2016. **Musa Mwaikunda vs Republic** [2006] TLR.

It is my finding that, the decision of the trial court was grounded on improper evidence therefore nullity. In the cause, I proceed to quash the judgment, proceedings and any subsequent orders therefrom the trial court and the 1st appellate court. Any party may, if so wishes file a fresh case before the court with competent jurisdiction. I give no orders as to costs.

It is so ordered.

DATED at **MWANZA** this 27th day of September 2022.

R.B. MASSAM.
JUDGE
27/09/2022

Court: This judgement was delivered in the presence of respondent's learned counsel and in absence of the appellant.

R.B. MASSAM.
JUDGE
27/09/2022