IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

PC CIVIL APPEAL NO. 09 OF 2022

(Arising from Civil Appeal No. 25 of 2021 from the District Court of Ukerewe at Nansio, original Civil Case No. 03 of 2021 in Ukerewe Primary Court at Bukindo)

GEORGE S/O ONG'AYO..... APPELLANT

VERSUS

ROBERT S/O ISSACK..... RESPONDENT

JUDGMENT

5 & 30/9/2022

ROBERT, J:-

The respondent George s/o Ong'ayo sued the appellant herein at the Primary Court of Bukindo for payment of TZS 1,100,000/= arising from an oral contract between them. He alleged that the appellant hired his boat twice on 15/03/2019 and 18/04/2019 to transport fish to two different areas at the cost of TZS 600,000/= per trip making a total of TZS 1,200,000/= but paid the respondent TZS 100,000/= only. Hence the Respondent instituted a claim for the recovery of the remaining TZS 1,100,000/=. After a full trial, the trial Court awarded the respondent the claimed amount. Aggrieved, the appellant appealed to the District Court of Ukerewe which upheld the decision of the trial court. Still aggrieved,

the preferred an appeal to this Court armed with the following grounds of appeal:

1. *That the Hon. first appellate court erred both in law and fact in affirming the decision of the trial court which was given against the weight of evidence.*
2. *That, the first appellate court erred in both law and fact in shifting the burden of proof to the appellant.*
3. *That, both the lower courts erred in law and fact for failing to correctly consider and evaluate the evidence on record and consequently reaching into wrong findings.*

The appellant prayed for an order allowing the appeal, quashing and setting aside the lower courts' decisions, costs of the appeal and before the lower courts and any other relief(s).

Hearing of this appeal was done orally whereby the appellant was represented by Mr. Elias Hezron, learned counsel whereas the respondent was represented by Mr. Arnold Katunzi, learned counsel.

Mr. Hezron took off first, he prayed to argue the first and third grounds together and the second ground separately. Submitting in support of the first and third grounds, he faulted the two lower courts for failure to properly apprehend the evidence on record thus reached into a

wrong finding. He argued that the respondent instituted a claim before the trial court claiming a breach of contract, he therefore had a duty to prove the existence of such contract and the breach thereof. He was of the view that the respondent failed to prove either of the two to the standard required by law.

He argued further that although the respondent claimed that the said agreement was made in the presence of four people but only one was called to testify, the respondent's brother. He maintained that the said witness was not credible as he claimed to be the one driving the alleged boat but there was no proof to that effect and secondly, he claimed to have received TZS 700,000/= from the appellant after he was arrested in Kenya so as to pay off the fine but the appellant denied that allegation and there was no proof to that effect.

Another piece of evidence from SMII which requires attention of this court is that while the respondent claimed that he received TZS 100,000/= from the appellant, SMII told the court that he witnessed the said amount of money being given to the respondent. He questioned failure of the respondent to call the other remaining three people who were present at the time the contract was made. He prayed that an adverse inference be made that those witnesses would have not testified in his favour.

With regards to the second ground of appeal, he submitted that it was wrong for the first appellate court to shift the burden of proof to the appellant. He referred to the impugned judgment of the first appellate court which stated that there was no evidence to prove that the appellant did not use the respondent's boat to send fish to Kenya. He claimed that the statement required the appellant to prove something he claimed he did not do thus shifted the burden of proof to him. He concluded his submissions by citing the case of **Paulina Samson Ndawavya vs Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017 to cement on his contention that the burden of proof lied on the respondent.

In response, the learned counsel for the respondent notified the Court that the appellant's third ground of appeal raises new issues which were not raised at the first appellate court and therefore should not be considered by this court sitting as the second appellate court. With respect to the first ground of appeal, he submitted that records of the first appellate Court reveals that the respondent had only one witness who was his young brother. Thus, he was of the opinion that the respondent ought to have called other witnesses apart from his brother to come and testify.

Expounding on the issue as to whether or not a relative can be the only witness, he referred this court to the case of **Mustapha Ramadhani Kihiyo vs Republic**, (2006) TLR 323, where the Court of Appeal held that the evidence of a related witness is credible and there is no room or law which requires the evidence of a relative to be discredited. He submitted that, SMII was a credible witness as he testified to be present when the appellant and respondent entered into a contract and he was the one who drove the boat in both trips. As for the remaining people who were in the boat, it was the respondent's testimony that they were not available at the time when the suit was being heard and therefore he could not locate them.

Coming to the second issue, he argued that the cited case of **Paulina Samson Ndawavya** (supra) is distinguishable because the decision was based on section 110 of the Evidence Act which does not apply in proceedings originating from Primary Court. On the allegation that the first appellate court shifted the burden of proof to the appellant, it was his argument that it was the appellant's testimony that he was not indebted by the respondent and had a different story that he was the one who had a claim against the respondent part of which was already paid. Counsel insisted that the appellant was therefore required to prove his

allegations that the respondent was not entitled to claim anything from him.

He contended further that, since the respondent was the one claiming against the appellant, it was correct for the first appellate court to require the appellant to prove how his claim in the first case relates to the claim in this matter. Lastly, he prayed that the appeal be dismissed and both lower courts' decisions be upheld.

In rejoinder submissions, the learned counsel for the appellant submitted with regard to the issue of burden of proof and the cited case of **Paulina Samson Ndawavya** (supra). He argued that, the position stated in the cited case is the correct jurisprudence as far as burden of proof is concerned in this country. He argued that, the section referred in the said case provides the same position as regulation 6 of the Primary Courts (Rules of Evidence) Regulations, 1964 GN No. 22 of 1964 which requires that he who alleges has the burden to prove. He argued that the case is therefore applicable in the circumstances.

With regards to the issue of Civil Case No. 06 of 2021, the learned counsel submitted that the court did not require the appellant to prove relevancy of the same to this matter instead it disregarded it, same as the trial court. He told this court that the two lower courts were right to

disregard it because it had no relevancy to the matter in dispute. He referred this court to page 6 of the impugned judgment of the first appellate court where the Court required the appellant to prove that he did not use the respondent's boat to send fish to Kenya. To him that was not correct because denial is incapable of being proved.

On the first and third grounds, he reiterated his earlier submission that a relative is a competent witness as stated in the **Mustapha** case (supra) however his issue was on the credibility of the said witness. He believed that the witness was not credible thus his evidence could not be relied upon. As for the contradictions indicated in his submissions in chief, he told this court that they have not been controverted by the respondent.

Lastly, he prayed that the appeal be allowed with costs.

I have examined the records of appeal, the grounds upon which the appeal rests and the submissions by the parties in support and against the appeal. I wish to start my deliberations with the issue raised by the learned counsel for the respondent on the third ground of appeal. He argued that the said issue cannot be entertained by this court because it never featured as a ground of appeal in the first appellate court. I have gone through the records of appeal in the first appellate court and indeed failed to come across the said ground of appeal. It is trite law that an

appellate court cannot hear and determine issues or matters that were not heard and determined in the lower court. In the case of **Hotel Travertine Ltd & Two Others vs National Bank of Commerce Limited** [2006] TLR 133 it was held that;

> *"as a matter of general principle an appellate court cannot allow matters not taken or pleaded in the court below to be raised on appeal"*

Hence, the new matter raised in the third ground of appeal which was not raised in the Courts below will be treated by this Court as an afterthought and therefore no considered in the determination of this second appeal. That said, I will proceed to consider the remaining two grounds of appeal.

On the first ground of appeal, the appellant is faulting the first trial court for affirming the trial court's decision which was given against the weight of evidence. His main complaint is that although there were four people present at the time the alleged agreement was made, the respondent brought only one witness who was his brother. He was of the opinion that the respondent ought to have called other people who were present when the alleged contract was entered into because according to him, the respondent's brother was not a credible witness as he failed to

show proof that he was the one driving the boat and that they were arrested and had to pay fine.

The respondent's reply to the above claim to which I fully subscribe, was that SMII, the respondent's brother was a credible witness and that his being related to the respondent could not be used to discredit his testimony. His credibility could be seen in his testimony as the person who witnessed the appellant and respondent entering into an agreement. Further to that, he was the one who drove the boat for the appellant in both trips. He therefore had knowledge of the suit between the parties. The records of the suit before the trial court reveal that the respondent testified that the only other person apart from him and the appellant was SMII, his young brother. SMII also testified that they were the only people present at the time the agreement was made. From those testimonies, there is no way the respondent could have brought another person to testify apart from his brother. After all, what is important is the competence and credibility of a witness and not his/her relationship with the person who called him/her. The Court of Appeal in **Paulo Tayari vs The Republic**, Criminal Appeal No. 216 of 1994 (unreported) held that;

> *"we wish to say at the outset that it is, of course, not the law that whenever relatives testify to any event, they should not be believed unless there is*

also evidence of non-relative corroborating their story. While the possibility that relatives may choose to team up and untruthfully promote a certain version of events must be borne in mind, the evidence of each of them must be considered on merit, as should also be the totality of the story told by them. The veracity of their story must be considered and gauged judiciously just like the evidence of non-relatives. It may be necessary, in given circumstances for a trial judge or magistrate to indicate awareness of the possibility of relatives having a common interest to promote and serve, but that is not to say a conviction based on such evidence cannot hold unless there is supporting evidence by a non-relative."

I fully subscribe to the position stated in the above authority. If both lower courts satisfied themselves on the competence and credibility of the respondent's witness, I find no reason to interfere with their findings.

The allegation that there were four people present was only brought up by the appellant himself at the first appellate court when he was submitting in support of his appeal insisting that they were supposed to be called as witnesses. One main question to be asked here is that if the appellant denied everything, even being present and entering into a contract with the respondent, how did he know that there were four other

people at the time the alleged agreement was made? If anything, his testimony was the one questionable. As long as there is no reason to doubt the credibility of the respondent's witness, I find this ground without merit.

Coming to the second ground of appeal, the appellant's complaint is that the first appellate court shifted the burden of proof to him. He made reference to page 6 paragraph 2 line 8 and 14 of the impugned judgment showing that the first appellate court stated that there was no sufficient evidence to prove that the appellant never used the respondent's boat and went further to state that any person who alleges has a burden to prove. According to him, that amounted to shifting the burden of proof from the respondent to him. He went further and cited the authority in the case of **Paulina Samson Ndawavya** (supra) to buttress his contention that the burden of proof lies on the person who alleges.

The learned counsel for the respondent however, had a whole different view that the case referred to by the appellant is distinguishable as reference was made to the provisions of section 110 of Evidence Act which is not applicable in the proceedings originating from Primary Courts. With due respect to the learned counsel, what was extracted from the cited case was the principle which can be applied generally irrespective of

the section that was referred to. In this matter, as rightly argued by the learned counsel for the appellant when referring to regulation 6 of GN No. 22 of 1964 (supra) that the same carries the same principle as section 110 of the Evidence Act. I believe therefore that the cited case is very much applicable in the circumstances.

With regard to the complaint that the first appellate court shifted the burden of proof, having passed through the decision complained of, I can say with certainty that the court did not at any point shift the burden of proof to the appellant. What it did was make a remark that the appellant was supposed to prove what he was alleging and that came after the appellant had brought up a new story which was not related in any way with the claim that was before the court.

It should also be noted that in the last paragraph of the impugned decision, the first appellate court stated that *"I conclude that the respondent proved his claim before the trial court on the balance of probabilities"*. That statement is enough proof that the burden to prove never shifted from the respondent and the said conclusion resulted from the satisfaction by the first appellate Court that the burden to prove the claim was discharged fully by none other than the respondent. That said, I find no merit in the ground.

Having found as above, I see no reason to depart from the lower courts' findings. Consequently, I proceed to dismiss the appeal with costs.

It is so ordered.

K.N.ROBERT
JUDGE
30/9/2022