

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DODOMA DISTRICT REGISTRY)
AT DODOMA**

(PC) CIVIL APPEAL NO. 17 OF 2021

(Originating from District Court of Dodoma in Civil Appeal No. 55 of 2019, Originated from Civil Case No. 355 of 2019 at Chamwino Urban Primary Court)

KHERY DANIEL KIWELU..... APPELLANT

VERSUS

MONICA MARTIN RESPONDENT

15/8/2022 & 19/8/2022

JUDGMENT

MASAJU, J

The Respondent, Monica Martin, successfully sued the Appellant, Khery Daniel Kiwelu, in the Primary Court of Chamwino urban at Dodoma, for the recovery of money being payment for 120 Marine Boards and 2 ladders allegedly hired by the Appellant for construction works at his house. The Respondent was awarded TZS 7,440,000/= for the 125 days delay from the 4th day of July, 2019 to the date of the trial court's judgment on the 7th day of November, 2019. The Appellant unsuccessfully appealed to the District Court of Dodoma at Dodoma where the amount was reduced to TZS 1,180,000/= hence the appeal to this Court. The Appellant's Petition of Appeal is made up of six (6) grounds of Appeal.

When the appeal was heard in the Court on the 4th and 20th days of July, 2022 the Appellant was represented by Mr. Elias Machibya and Ms.

Catherine Wambura, the learned counsels, while the Respondent was represented by Mr. Cheapson Kidumage and Mr. Collins Benda, the learned counsels.

The Appellant consolidated the 1st, 4th and 5th ground and argued them together that, the record of the trial court reveals that it is the technician, Abraham Kindambi (DW2) who went to the Respondent to hire the said 120 marine boards. That, he does not state that he was sent there by the Appellant. That, he was also the one who delayed to send back the said marine to the Respondent. That, surprisingly the DW2 was not sued. That, the Respondent testified that he was claiming TZS 1,800,000/= from the Appellant. That, the claim was not proved in the trial court because the same was different from what she had pleaded in her plaint.

As regards the 2nd and 3rd ground of appeal, the Appellant submitted that the Respondent had no cause of action against the Appellant. That, the principle of Principal- Agent relationship had not been raised or considered in the trial Court since DW2 is the one who went to hire the marine boards then there was no any contract between the Appellant and the Respondent. That, the Appellant only approached the Respondent on the delay of the marine board, that, the Respondent refused to take back the said marine boards and went to court instead. The Appellant cited **Q-Bar Limited V. Commissioner General, Tanzania Revenue Authority** (CAT) Civil Appeal No. 163 of 2021, Dar es salaam Registry and **Registered Trusteed of the Cashewnuts Industry Development Fund V. Cashewnuts Board of Tanzania** (CAT) Civil Appeal No. 18 of 2001, Dar es salaam Registry, to support his submissions.

As regards the 6th ground of appeal, the Appellant submitted that the District Court observed that there was irregularity on how the trial court had

analysed the evidence and the award thereof. That, the irregularities thereof were fatal and occasioned failure of justice to the Appellant. The Appellant prayed the Court to allow the appeal with costs.

The Respondent contested the appeal by arguing on the 1st, 4th and 5th ground of appeal that, it was the Appellant who was liable for the payment of expenses of hiring the marine boards because the house being constructed was his as per the Appellant's witness (DW2) and Kibiri Kasogota (PW2)'s evidence that it was him who rented the marine boards and that the mason just went to take them from the Respondent. That, the claim of TZS 1,800,000/= by the Respondent was proved accordingly before the trial court. That, the Appellant did not contest the legality of TZS 1,800,000/= in the 1st appellate court, but the legality of TZS 7,440,000/= thus an afterthought.

As regards the 2nd and 3rd grounds of appeal the Respondent submitted that there was a principal of Principal -Agent relationship between the Appellant and his mason. That the case cited by the Appellant, **The Registered Trustees of the Cashewnuts Board of Tanzania (Supra)** is distinguishable and not applicable to the instant case.

As regards the 6th ground of appeal the Respondent contested it by arguing that the alleged irregularities of the trial court on the analysis of the evidence adduced before it did not go to the root of the rights of the parties nor occasion failure of justice. That, substantial justice as per section 37(2) of the Magistrates' Courts Act [Cap 11] was done accordingly. The Respondent prayed the court to dismiss the appeal with costs for want of merit.

In rejoinder, the Appellant maintained his submissions in chief and added that indeed it was the duty of the owner of the house to pay for

equipment's for construction. The Appellant prayed the Court to allow the appeal.

That is what was submitted by the parties in support of, and against the appeal in the Court.

There is no dispute that, indeed, the Appellant hired the 120 marine boards and two (2) ladders from the Respondent as the Appellant himself readily agree in his testimony before the trial court. There is also no dispute that DW2 working as the Appellant's Mason went to take the marines and ladders from the Respondent's residence to the Appellant's construction site. The Appellant admitted in the trial court that he was the one supposed liable to pay the costs for the marines, the ladder and transportation for the marines.

The parties entered an oral agreement that the marines and ladders were to be hired for three days for TZS 80,000/= but unfortunately the Appellant stayed with them for two weeks as testified by the Respondent as well as the Respondent's witnesses/mason (DW2) when he was asked a questions for clarification by the trial court's assessors, thus;

"Hoja za Mahakama

Mashauri

- Tulikaa nazo wiki mbili"

That being the case, since the 120 marines and 2 ladders were hired by the Appellant to be used in construction of his own house, the Appellant himself is the one responsible to pay the Respondent costs for the delay in returning them to the owner, the Respondent, leading to the Respondent filing the civil suit against him.

The Appellant's case and the appeal were not supported by ascertainable facts in his favour, hence a risky action in the hope of a desired result, a gamble. Justice is made of law plus ascertainable material facts, not parties desired result thereof.

The Court is of the considered position that, the 1st appellate court rightly awarded the Respondent TZS 1,800,000/= as claimed by the Respondent in the trial court.

The appeal is hereby dismissed with costs for want of merit.




GEORGE M. MASAJU

JUDGE

19/8/2022