

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA AT ARUSHA

CIVIL APPEAL NO. 13 OF 2021

*(C/f Civil Appeal No.11 of 2021 in the District Court of Arusha at Arusha,
Originating from Civil Case No.319 of 2020 in Arusha Urban Primary Court)*

MARCELIUS BURCHARD RUTTAAPPELLANT

VRS

ELISESIA STEPHEN KISANGA.....RESPONDENT

JUDGMENT

Date of last Order: 13-9-2022

Date of Judgment:17-10-2022

B.K.PHILLIP,J

Aggrieved by the Judgment of the District Court of Arusha at Arusha, the appellant herein lodged this appeal on the following grounds;

- i) That, the Magistrate erred in law and fact by holding the appellant in breach of the contract.(sic)
- ii) That, the Magistrate erred in law and fact by holding the evidence of the respondent (sic) was heavier than that of the appellant.
- iii) That, the Magistrate erred in law and fact by considering Appellant's defense and counter claim as an afterthought.

At the trial Court ,it was the respondent's case that in October 2019, while in her normal course of business she met with the appellant and had conversation with him in which the appellant informed her that

he (appellant) was in a final stage of registering his tourist Company. Moreover, he told her that renting tents to tourists is one of the lucrative businesses in tourist industry and urged her to try that business. The respondent was convinced and agreed with the appellant that she would give him a sum of Tshs 10,000,000/= for buying tents for renting the same to tourists in corroboration with the appellant. So, in November 2019, upon communicating with the appellant and being satisfied that everything was in order she made arrangement for securing the said sum of Tshs 10,000,000/= and handed over the same to the appellant for buying the tents since she believed that he had the required knowledge on the types of suitable tents. Handing over of the said sum of Tshs 10,000,000/= to the appellant was preceded by the signing of the contract by both the appellant and respondent before an advocate and attested accordingly, signifying the receipt the said Tshs 10,000,000/= by the appellant. On the 26th of November 2019, the respondent communicated with the appellant who assured her that he had already bought the tents as agreed. However, what disturbed the respondent and triggered the filing of the case against the appellant is that when she requested the appellant to show her the said tents the appellant failed to do so. Then, respondent was suspicious that the tents were not bought. Thus, she demanded to be paid her money (Tshs 10,000,000/=).The appellant did not heed to her demands. Consequently, the respondent filed a case at the Primary Court of Arusha Urban Primary Court against the appellant claiming for her money (Tshs 10,000,000/=) . The case was heard on merits and the Primary Court

delivered its judgment in favour of the respondent . It ordered the appellant to pay the respondent a sum of Tshs 9,200,000/= with costs. It was the trial Court's findings that the appellant had paid back to the respondent a sum of Tshs 800,000/= only out Tshs 10,000,000/= he received from the respondent. Aggrieved by the aforesaid judgment of the Primary Court, the appellant appealed at the District Court of Arusha at Arusha on a number of grounds. Basically he was challenging the trial Court's analysis and evaluation of the evidence adduced by the parties. His appeal did not sail through. The District Court upheld the judgment of the Primary Court and dismissed his appeal with costs.

Now, back to the appeal in hand, the appeal was heard viva voce. The learned Advocates Anold Wilson and Lobulu Osujaki appeared for the appellant and respondent respectively.

Submitting in support of the 1st ground of appeal, Mr. Wilson argued as follows; that the trial Court erred to hold that there was breach of the loan agreement between the appellant and the respondent on the reason that the loan agreement that was entered into by the respondent was for a sum of Tshs 10,000,000/= payable within fifteen (15) months by installments. The loan was supposed to be cleared by March 2022. The appellant had not failed to discharge his obligations. So, far he had paid the respondent a sum of Tshs 6,800,000/=. The remaining amount was Tshs 4,200,000/= only. Mr. Wilson contended that breach of contract happens when a party fails to fulfill his obligation, which was not the case in the contract in question. The Contract period had not yet expired argued , Mr. Wilson.

Moreover, Mr. Wilson submitted that the appellant gave the respondent his motor vehicle as a security for the outstanding amount, that is , Tshs 4,200,000/= only.

With regard to the 2nd ground of appeal, Mr. Wilson submitted that appellant's evidence was heavier than the respondent's evidence and authentic. Apart from his testimony, the appellant provided to the trial Court documentary evidence as required by the law. Mr. Wilson cited the case of **Hemedi Said Vs Mohamed Mbiru, (1984) TLR. 113** and Rule 8(1) of the Magistrates' Courts (Rules of evidence in Primary Courts) Regulations , GN. No. 66 of 1972, to cement his argument. He went on submitting that the appellant tendered in Court the MEMATS for his Company and the motor vehicle registration card for his motor vehicle that is in possession of the respondent. He explained clearly before the trial Magistrate that his motor vehicle is more valuable than the outstanding loan amount , and the dispute between him and the appellant is due to the misunderstandings arising from their love affairs.

In addition to the above, Mr. Wilson contended that the contract that was tendered by the appellant in Court as her exhibit is not stamped. That is , no stamp duty was paid for the same, thus it was admitted in evidence in contravention of the Stamp Duty Act. He prayed the same to be expunged from the Court's records. Also, it was Mr. Wilson's contention that the trial Magistrate erred to ignore the appellant's claim (counter claim) in respect of his Motor vehicle which up to date is in possession of the respondent and has more value than the outstanding amount. It was Mr. Wilson's argument that according to Rule 44 and 46 of the

Magistrates' Courts (Civil Procedure in Primary Court Rules), GN.119 of 1983 , on the 1st day of the hearing the trial Court was supposed to ascertain the issue in dispute between the parties but did not do so. To cement his argument Mr. Wilson referred this Court to page 1928 of a text book titled "Mulla , The Code of Civil Procedure 18th Ed".He prayed this appeal to be allowed.

In response to the arguments raised by Mr. Wilson, Mr. Lobulu argued strongly that the 1st ground of appeal has no merit on the reason that no evidence was tendered in Court to prove the fulfillment/ execution of the contract between the appellant and respondent. He contended that the appellant managed to prove that he paid to the respondent Tshs 800,000/= only out of Tshs 10,000,000/= he received from the respondent . Thus, the trial Court's judgment cannot be faulted.

With regard to the 2nd ground of appeal, Mr. Lobulu argued strongly that the Primary Court Magistrate is the one who had opportunity to evaluate both documentary and oral evidence ,and accord the same the weight it deserves. He contended that this Court cannot re-evaluate the evidence adduced by the parties at the trial Court but has to rely on the evaluation of evidence done by the Primary Court.

On the concern on non-payment of stamp duty, Mr. Lobulu urged this Court not to entertain the same because it was not raised in both lower Courts. Thus ,it is a new issue wrongly raised at this stage as an afterthought. In the alternative, Mr. Wilson submitted that the issue on non-payment of stamp duty does not change the substance of the

contract. He argued that our Courts have been issuing orders for payment of stamp duty even at appellate stage for documents admitted in the lower Courts while not stamped.

With regard to the 3rd ground of appeal, Mr. Lobulu submitted that the Primary Court cannot be faulted for not entertaining the appellant's claims against the respondent because the appellant did not inform the trial Court at the beginning of the case that he had any claims against the respondent as required by the law, instead he raised his claims when he was defending himself. Further, he argued that the appellant had a room to file a fresh case for his claims against the respondent, if at all he wished to do so. Mr. Lobulu did not dispute the literature in the text book cited by Mr. Wilson. However, he contended that the same is irrelevant in this matter because the appellant did not raise his counter claim properly as required by the law. In concluding his submission Mr. Lobulu prayed for the dismissal of this appeal with costs.

In rejoinder, Mr. Wilson reiterated his submission in chief and added the following points; that the contract for buying tents was no longer valid because the appellant paid the respondent part of the money. This Court cannot order for the payment of stamp duty at this stage. Mr. Lobulu did not cite any case law to support his proposal that this Court can order payment of stamp duty for the Contract at this stage.

Moreover, Mr. Wilson maintained that this Court has powers to re-evaluate the evidence adduced by the parties at the trial. He insisted that the

Regulations he cited in his submission in chief provide that a counter claim can be raised during the hearing of the defence case.

Having analyzed the submissions made by the learned advocates as well as perused the Court's records, let me embark on the determination of the grounds of appeal. I will deal with the 1st and 3rd grounds of appeal, conjointly since the advocates' arguments in respect of those two grounds of appeal are intertwined. Looking at the evidence adduced by the parties, it is not in dispute that the respondent did give the appellant a sum of Tshs 10,000,000/= for the purpose of buying tents. This is evidenced by the Contract between the appellant and the respondent (Exhibit "D1"). In his defence the appellant admitted that he received the said sum of Tshs 10,000,000/= from the respondent. However, he claimed that he paid back to the respondent some money in difference incidences. For instance, he testified that he was asked by the respondent to pay a sum of Tshs 2,000,000/= for grill windows for her house. In short, the appellant claimed that the outstanding amount is Tshs 6,900,000/= only. Also, it is not in dispute that the appellant did not buy the tents as agreed. Under the circumstances, I do not find any justifiable reason to fault the holding of the trial Court that there was breach of contract because it is true that what was agreed in the contract was not fulfilled by the appellant and no evidence was adduced by the appellant to prove that there is any contract addendum signed by the parties to vary the conditions stipulated in Exhibit D1.

In addition to the above, the respondent's testimony on the existence of a written contract between her and the appellant is supported by the

testimony of the learned Advocate Seleman Godfrey Sandi , (PW2) and the contract itself (Exhibit "D1"). Thus, the appellant's testimony that he did not sign any written agreement with the respondent is unfounded. Mr. Wilson's contention that there was a loan agreement which was to expire in March 2022 is unfounded and not supported by the evidence adduced by the parties at the trial Court. In fact , the whole notion that there was loan agreement is completely strange. What can be gathered from the contents of Exhibit "D1" is that the appellant was supposed to buy the tents immediately after receiving the said sum of Tshs 10,000,000/=. The Contract (Exhibit "D1) was signed in November 2019. The respondent lodged her case in the Primary Court in October 2020 since no tents were bought by the appellant and the appellant concedes that he did not buy the tents. In my opinion that is a sufficient proof that there was breach of contract.

I have taken into consideration Mr. Wilson's contention that the contract between the appellant and respondent was varied in the sense that they abandoned their original plan and agreed on an arrangement for paying back the respondent's money by installments. That some of the money was used to pay for the respondent's grill windows for her house and the respondent's motor vehicle with registration No.T517 DLZ, Toyota Alphard, was handed over to the respondent as security for the outstanding amount. First of all, it is noteworthy that, there was no sufficient evidence adduced by the appellant to prove that the contract (Exhibit "D1") was varied apart from verbal assertions which, in my opinion cannot override the contents of the contract (exhibit "D1"). Secondly,

going by the appellant's contention ,it is obvious that he is alleging that there was " an oral contract " between him and the respondent which was entered into following his failure to fulfill the written contract (Exhibit "D1"). However, looking at the evidence adduced at the trial Court, I find that the appellant has miserably failed to establish the connection between the contract he entered into with the respondent for buying tents (Exhibit "D1") and the allegedly new oral contract. To say the least the appellant's testimony at the trial court was not consistent because at first he denied to have signed the contract (Exhibit "D1") and at the end of his testimony he agreed that the respondent gave him the said sum of Tshs 10,000,000/=. In short , whatever agreement made between the parties in respect of the motor vehicle with registration No.T517 DLZ, Toyota Alphard if any , it was a separate deal different from the contract for buying tents. In the same line of thinking, I am inclined to agree with trial Court's holding that the appellant is supposed to file a fresh case for claiming the motor vehicle (Toyota Alphard) which he alleged that it is in the possession of the respondent. It has to be noted that the Court has powers to reject to entertain a counter claim if it is of the opinion that the same cannot be dealt with conjointly with the plaintiff's case.

In addition to the above , the court's records reveal that at the beginning of the hearing the appellant did not indicate that he had any claim against the respondent. The claims for his motor vehicle were raised during the hearing of the defence case. Thus, the respondent had no opportunity to defend herself against the appellant's claims.

From the foregoing, it is the finding of this Court that the 1st and 3rd grounds of appeal have no merit.

Coming to the 2nd ground of appeal, The position of the law is that the 1st appellate Court has powers to re –evaluate the evidence adduced at the trial Court and come to its own conclusion. In the case of **Christina Damiano Vs The Republic, Criminal Appeal No.178 of 2012**, (unreported), the Court of Appeal had this to say on re- evaluation of evidence by the 1st appellant Court;

"...We have carefully gone through the record of proceedings and judgment of the trial Court. This being the first appeal, this Court is entitled to re-evaluate the evidence and come to its own conclusions...."

In the instant case, this is a second 2nd appeal. Had it been the 1st appeal I would be inclined to agree with Mr. Wilson that this Courts has unlimited powers to re-evaluate the evidence adduced at the trial Court and come to its own conclusions . The position of the law is that the 2nd appellate Court is not supposed to interfere with the concurrent findings of the two lower Courts and come with its own conclusions unless there are fatal irregularities and /or a violation of some principle of law or procedure which have occasioned miscarriage of justice. In the case of **Juma Kasema@ Nhumbu Vs The Republic, Criminal Appeal No.550 of 2016** (unreported) the Court of Appeal had this to say on the powers of the 2nd appellant Court as far as re- evaluation of evidence is concern;

".....we wish to reiterate the settled principle which state that, in the second appeal like the present one, the Court should rarely interfere with concurrent findings of fact by the lower courts based on credibility. The rationale behind is that the trial court

*having seen the witnesses is better placed to assess their demeanour and credibility, whereas the second appellate court assess the same from the record. Therefore, the Court is entitled to interfere with the concurrent findings of facts made by the courts below if there has been misapprehension of the nature and quality of evidence and other recognized factors occasioning miscarriage of justice. This position was well stated in **Director of Public Prosecutions v. Jaffari Mfaume Kawawa**, [1981] TLR 149; **Mussa Mwaikunda v. Republic**, [2006] TLR 387; **Wankuru Mwita v. Republic**, Criminal Appeal No. 219 of 2012 and **Omary Lugiko Ndaki v. The Republic**, Criminal Appeal No. 544 of 2015 (both unreported). Specifically in **Wankuru Mwita** (supra) the Court said:-*

"...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."

In this appeal Mr. Wilson contended that the appellant's evidence was heavier than the respondent's evidence on the ground that apart from oral testimony, he tendered in Court documentary evidence. However, he did not point out any irregularity or violation of some principles of the law or misapprehension of the substance of the evidence adduced to move this Court to interfere with the concurrent findings of the trial Court and the 1st appellate Court. Under the circumstances I will not interfere with the concurrent findings of the lower Courts.

In addition to the above, I wish to reiterate my findings in the 1st ground of appeal that there is ample evidence proving breach of contract (Exhibit D1) between the appellant and the respondent.

With regard to Mr. Wilson's concern on the non-payment of stamp duty in respect of the contract (Exhibit "D1") , I am inclined to agree with Mr. Lobulu that the issue on non- payment of stamp duty is a new issue since it was not raised in both lower Courts. The position of the law is that this Court being a 2nd appellant Court cannot deal with new issues which were not determined by either the trial Court or the 1st appellant Court.[See the case of **Grand Alliance Ltd Vs Mr Wilfred Lucas Tarimo and 4 others , Civil Application N.187/16 of 2019 , (CA)** (unreported)]. Moreover, Mr. Wilson did not cite any provision of the Stamp Duty Act to substantiate his assertion that Exhibit "D1" was a chargeable with stamp duty. Thus, Mr. Wilson's prayer that Exhibit "D1" should be expunged from the Court's records has no merit and is hereby dismissed.

In the upshot, this appeal is dismissed with costs.

Dated this 17th day of October 2022




B.K.PHILLIP
JUDGE