

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**PC. CIVIL APPEAL NO.26 OF 2022**

*(Arising from the Civil Appeal No.07 of 2022 Kigamboni District Court,*

*Originating from Kigamboni Primary Court in Civil Case No.31 of 2022)*

**KUSANYA YOHANA KUSUSI.....APPELLANT**

**VERSUS**

**BENJAMIN MONDEY.....RESPONDENT**

**JUDGMENT**

*Date of last Order: 2/11/2022*

*Date of Judgment: 14/11/2022*

**POMO; J**

The Appellant is aggrieved with the decision of Kigamboni District Court in Civil Appeal No. Civil Appeal No.7 of 2022 the decision which was delivered on 12<sup>th</sup> September,2022, by overturning the trial primary court decision, Civil Case No.31 of 2022 which was in his favour.

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The background, albeit briefly, to the dispute is that on 28<sup>th</sup> February, 2022 the appellant claims to have entered into agreement with the Respondent to rehabilitate and innovate the respondent's house at Kigamboni area in Dar es Salaam region. The allegedly rehabilitation and innovation was of the house sewage system and fixing floor tiles in that house, the tiles which were wrongly fixed earlier by another technician, among others. The labour charges for the whole work discharged by the Appellant stood at Tshs 1,595,000/- the amount the respondent is alleged to have failed to pay hence filing of Civil Case No. 31 of 2022 Kigamboni Primary Court (the trial court). Having heard the parties, in the end the trial court decided in the Appellant's favour by granting him the said claimed Tshs 1, 595,000/-

Aggrieved by that decision by the trial primary court the respondent vide PC Civil Appeal No. 7 of 2022 appealed to Kigamboni District Court the appeal which was determined on 12<sup>th</sup> September, 2022 in his favour in that, the amount the respondent was condemned by the trial primary court to pay the Appellant was reduced from Tsh 1,595,000/- to Tshs 150,000/-. The appellant is aggrieved by that findings by the appellate district court hence the appeal herein containing two grounds of appeal, to wit: -



- 1. That, the first appellate Court erred in law and fact for failure to properly evaluate and consider the evidence adduced by the Appellant as a result reached to erroneous decision*
- 2. That, the first appellate Court erred in law and facts to award only Tsh 150,000/- while the Appellant proved his case*

When the appeal was called on for hearing on 2<sup>nd</sup> November, 2022, the appellant appeared unrepresented while the Respondent appeared represented by Ms. Diana Simon, the learned counsel. Hearing of the appeal was ordered by this court to be by way of written submission the order the parties have complied with.

It is the appellant's submission in support of the grounds of appeal that the first appellate court failed to analyze and consider the appellant's evidence in that while recognizing existence of contract between the parties herein and also having found the respondent to be in breach of the said contract then basing on the evidence on record the appellant argues to have proved his claim of Tsh 1,595,000/- against the Respondent. In the end submitted that, it was wrong for the first appellate court to reverse the amount awarded by the trial court from Tsh 1,595,000/- to Tsh 150,000/-.



In reply, the respondent is submitting that, contrary to the appellant's submission, the first appellate court analyzed the evidence on trial primary court record as stood adduced by the parties. He is of the argument that despite the appellant to have claimed Tsh 1,595,000/- the appellate court awarded him Tsh 150,000/- basing on the evidence on record. That, the appellants calculations for the amount claimed particularly on each item of the claimed amount against the respondent is unsupported. Ms Diana, the counsel for the Respondent referred this court to the case of **Ziad Mohamed Rasool General Trading Co. L.L.C Vs Anneth Joachim Mushi (Executrix of the estate of Emanuel Partick Musoma) Civil Case No.21 of 2021 High Court at Dar es Salaam (unreported)** at p.12 last paragraph where this court held thus:

*"As the plaintiff has failed to prove its case as per the requirement of section 110 of Evidence Act and on balance of probability that he entered into sale of goods agreement with the deceased, I hold the first issue is determined in negative. Therefore, there was no supply of goods agreement between the plaintiff and defendant."* End of quote

It was the respondent's further submission that the amount awarded to the tune of Tsh 150,000/- are out of the respondent's amount he

voluntarily promised to give the appellant and not out of the allegedly work done by the Appellant since they did not have an agreement that he will pay the appellant for the works he did in respect of the Respondent's house at Kigamboni

Having heard the rival submission from both sides in support and against the grounds of appeal, I find it aptly to resolve them all together since the grounds are inter-related. In so doing I will be guided by the trial primary record.

The evidence by the appellant on record is that he is a local technician and on 28/2/2021 he entered into contract with the Respondent to rehabilitate and renovate the Respondent's house at Kigamboni area in Dar es Salaam region, the work which involved rehabilitation of house sewage system; fixing tiles and house floor, expanding toilet window; re-fixing the sewage water pipes, fixing a platforms to the second floor for construction etc. All these works were done at the labour charge of Tsh 1,595,000/- (see pp.2 – 3 of the trial court proceedings). This evidence was not controverted by the respondent during cross-examination,

On the other hand, the evidence by the respondent admits the Appellant to have done the work but asserts that the work done by the appellant did not attract payment as he did it on volunteering basis (see pp. 5 – 8 of the trial court proceedings). All the corroborative witnesses from both sides of the case who testified in court gave evidence that the appellant performed the said respondent's works at Kigamboni area in Dar es Salaam.

Admittedly, there is no any documentary evidence in support or against the claim from either party of the dispute which was ever tendered in court by the parties meaning the only available evidence is that of oral evidence the evidence which have to be determined on the basis of credibility. The dispute between the parties herein therefore is that of whether there existed oral contract between them and if any then whether it was breached

In the decision by the Court of Appeal in **British America Tobacco Kenya Limited Vs Mohan's Oysterbay Drinks Limited, Civil Appeal No.209 Of 2019 CAT at Dar Es Salaam (Unreported)** at p.14 - 15 the court of appeal had this to state: -

*Implied contracts are a creature of the statute. **Section 9 of the Law of Contract Act, [Cap 345 R. E. 2019] (the Act)** provides: -*

*"In so far as the proposal or acceptance of any promise **is made in words, the promise is said to be express**; and in so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied."*

The court of appeal went on quoting its own earlier decision in **Catherine Merema vs Wathaigo Chacha**, Civil Appeal No. 319 of 2017 (unreported), in which the Court reproduced the following passage from **Combe vs Combe** [1951] 1 All E. R. 767 which reflects section 9 of the Act : -

*" The principle as I understand it, is that **where a party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance has been made by him, but must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only his word.**"* End of quote

Guided by the above court of appeal decision and having scrutinized critically the evidence on record, it is my views that the findings by the first appellate district court reversing the trial court findings from being paid Tsh 1,595,000/- to Tsh 150,000/- is not supported by the evidence. This is because the evidence by the appellant is more credible compared to the Respondent in that the respondent does not dispute the appellant to have performed the work of rehabilitation and renovation of the Respondent's house at Kigamboni area in Dar es Salaam and is categorical to the labour charge agreed for each item of work done.

It is my further findings that the **Ziad Mohamed's** case (**supra**) of this court cited by the Respondent is distinguishable in the manner I have found, that the appellant's evidence is more credible to that of the Respondent

That said, I find merit in this appeal. I set aside and quash the first appellate judgment and decree. I further order that the decision by the trial court is hereby restored. For avoidance of doubt, the appeal is hereby allowed with costs.

It is so ordered



Right of Appeal explained

Dated at Dar es Salaam this 14<sup>th</sup> day of November, 2022



  
Musa K. Pomo

Judge

This Judgment is delivered on this 14<sup>th</sup> November, 2022 in presence of the Appellant unrepresented and Ms Diana Simon, the learned advocate for the Respondent.



  
Musa K. Pomo

Judge

14/11/2022