

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

(PC) CIVIL APPEAL NO. 11 OF 2022

(Arising from Civil Appeal No. 13 of 2021 of the District Court of Karagwe at Kayanga and Originating from Civil Case No. 52 of 2020 of the Kayanga Primary Court)

VALENTINA SHABIRIRA----- APPELLANT

VERSUS

LEOPORD DAUD----- RESPONDENT

JUDGMENT

Date of Last Order: 22/03/2022

Date of Judgment: 01/04/2022

Hon. A. E. Mwipopo, J.

Valentina Shabirira, the appellant herein, filed Civil Case No. 52 of 2020 at Kayanga Primary Court claiming for recovery of shillings 1,200,000/= from the respondent namely Leopord Daud for the breach of contract. The Appellant alleged that on 18th October, 2018 she entered into agreement with the respondent who is a carpenter to make 10 doors for shillings 1,390,000/= to be delivered to her by 15th December, 2018. The appellant paid a total of shillings 1,200,000/= in instalment to the respondent but the said doors were not delivered on time and

as per agreed design. The Primary Court after hearing evidence from both parties delivered the judgment in favour of the respondent and ordered the appellant to pay the remaining amount in the agreement, to share equally shillings 180,000/= which exceeded the cost of making those doors as it was agreed initially before the change of the door design and the doors have to be delivered to the appellant. The appellant appealed to Karagwe District Court against the decision of the Primary Court. The District Court dismissed the appeal and upheld the decision and findings of the Primary Court. Appellant was not satisfied with the decision of the District Court and she filed the present appeal.

The Petition of Appeal filed in this Court by the appellant contains four grounds of appeal. The said grounds of appeal are as follows hereunder:-

- 1. That, both trial Courts grossly erred in law and facts to hear and decide the case without involving assessor's opinions contrary to requirement of section 7 (1) and (2) of the Magistrates Court Act, Cap. 11, R.E. 2019 making the whole proceedings and the decision thereof a nullity.*
- 2. That, both trial Courts grossly erred in law and facts for failure to know that the respondent was instructed by the appellant to make the same design of ten doors where its front and back of each door has to be the same which was not finished by the respondent according to instruction hence a wrong decision.*

3. *That, both trial Courts Magistrates misdirected themselves to grant the increased cost of shillings 180,000/= to be shared equally by the appellant and the respondent contrary to the written agreement made on 18th October, 2018.*
4. *That, both trial Courts grossly erred in law and facts for failure to know that the respondent's witnesses were not present during the contract entered by the two parties on 18th October, 2018 and thus the said witnesses testimony was not true before the Court of law hence the wrong decision was reached against the appellant.*
5. *That, both Trial Court grossly erred in law and in facts to decide the case against the watertight evidence adduced by the appellant and his witness who proved the case beyond balance of probability.*

When the matter came for hearing, Mr. Bitakwate, Advocate appearing for the appellant, abandoned ground No. 2, 3 and 4 and submitted on ground of appeal No. 1 and 5 only. On the first ground of appeal he submitted that the trial court erred to determine the matter without involving the assessors. This is contrary to section 7 (1) and (2) of the Magistrate Court Act, Cap. R.E 2019. This makes the decision of the Kayanga Primary Court to be a nullity. The assessors in the Primary Court are required to provide their opinion before the trial court delivered its judgment. In the proceedings of the trial Primary Court, the assessors

were not afforded with an opportunity to give their opinion. Even the judgment of the court does not show at all if the assessors provided their opinion. He cited the case of **Agnes Severine v. Mussa Mdoe [1989] T.L.R. 164** where it was held that the omission of the trial court to record the opinion of second assessor has made the purported judgment null and void. He submitted further that assessors were not afforded an opportunity to ask questions to the witnesses. To support this position he cited the case of **Awiniel Mtui and 3 Others v. Stanley Ephata Kimando**, Civil Appeal No. 97 of 2015, CAT at Arusha, (unreported), where the court held that the proceeding has to show if assessor has asked any question or if he has not asked any question. All these irregularities has vitiated proceedings and the proceedings before District Court which is made from vitiated proceedings becomes nullity.

On the 5th ground of appeal, the counsel said that the appellant proved his claim on balance of probabilities which is the required standard. The appellant's claims was that the respondent failed to make the doors to the agreed standards. The agreement was in writings which were tendered as Exhibit SM1A. In his testimony, respondent agreed that there was design which was part of the agreement and both agreed on the design of the door. The respondent said that he realized that the design was more expensive. He asked the appellant to increase the payment but appellant rejected and the respondent had to make those doors

on loss. This evidence proves the claims of appellant over the respondent. The Primary Court was supposed to order the respondent to deliver the doors as agreed or to refund the appellant with his cash. The counsel prayed for the court to order the appellant to complete 10 doors they agreed on the agreed design or to refund the money paid for the doors.

In his response, the respondent who appeared in person said regarding to the first ground of appeal that the assessors were present and were given opportunity to ask question and they signed the judgment. In each of the stage of the trial, then assessors were involved.

On the 5th ground of appeal, the respondent agreed that on each door the payment was Tshs. 140,000/= and he gave the appellant discount of Tshs. 10,000/=. After she has already paid for the door appellant sent another designed and asked respondent to make that design. He said that they agreed that respondent has to make the design and he has to inform the deference in the cost to the appellant. The respondent told the appellant the amount increased but she answered that she has no money. Respondent decided to make the doors until all were finished. The appellant asked respondent to remake the door by making design on both sides of the door or she will not take the door. The door are still in store for more than 3 years and if the appellant want the door she has to take them.

In his rejoinder, the counsel for the appellant retaliated his submission in chief.

From submissions, the issue for determination is whether or not the appeal has merits.

To start with the first ground of the appeal, the appellant counsel submitted that the trial Primary Court erred to determine the matter without involving the assessors. He said that assessors were not given opportunity to ask question to witnesses and they did not provide their opinion before the judgment was drafted. This makes the decision of the Kayanga Primary Court to be a nullity. The respondent on his party said that the assessors were involved throughout the trial where they asked questions to witnesses as result there is no irregularity in the proceedings.

Assessors are members of the Primary Court who are required to participate in both the decision making process and finally sign the judgment of the court. This is provided by section 7 of the Magistrates' Courts Act, Cap. 11 RE 2002 and Rule 3 of the Magistrates' Courts (Primary Courts) (Judgment of Court) Rules, G.N. No 2 of 1988. The said section 7 of the Magistrates Court Act provides as follows:

"7 (1) In every proceeding in the primary court, including a finding, the court shall sit with not less than two assessors.

(2) All matters in the primary court including a finding in any issue, the question of adjourning the hearing, an application for bail, a question of guilt or innocence of any accused person, the determination of sentence, the assessment of any monetary award and all questions and issues whatsoever shall, in the event of a difference between a magistrate and the assessors or any of them, be decided by the votes of the majority of the magistrates and assessors present and, in the event of an equality of votes the magistrate shall have the casting vote in addition to his deliberative vote.

(3).....”

From above cited sections, it was mandatory for the Primary Court to sit with not less than two assessors in any matter before it. The Assessors are part of the Primary Court together with the Magistrate. Under section 7(1) and (2) of the Act, there is no requirement for the assessors to give their opinions before the magistrate writes the judgment.

The Magistrates' Courts (Primary Courts) (Judgment of Court) Rules, G.N. No 2 of 1988 provides for the procedure of reaching the decision of Primary Court. It provides in rule 3 for the duty of the Magistrates to consult with the Assessors before the decision is reached. The rule reads as follows:-

"3. (1) *Where in any proceedings the court has heard all the evidence or matters pertaining to the issue to be determined by the court, the*

magistrate shall proceed to consult with the assessors present, with the view of reaching a decision of the court.

(2) If all the members of the court agree on one decision, the magistrate shall proceed to record the decision or judgment of the court which shall be signed by all the members.

(3) For the avoidance of doubt a magistrate shall not, in lieu of or in addition to, the consultations referred to in sub-rule (1) of this Rule, been title d to sum up to the other members of the court.”

Looking at the above cited rules, it does not demand the assessors to give their opinions on any issue before the court. Under sub - rule (1) all members of the court are required to participate in the decision making process of the court after hearing the evidence from the parties is completed. The sub-rule (1) makes it mandatory for the Magistrate to consult with assessors before the decision is reached. The decision is reached by members of the court to meet and deliberate on the issues before them. Thereafter, the magistrate will write down the decision, which will then be signed by all members of the court. According to Rule 3(2), where there is no dissenting opinion among members of the court, the magistrate shall write the judgment which shall be signed by all members. This means that when the judgment of the Primary Court is signed by the magistrate and assessors, assessors agreed on the decision written by the magistrate.

In the case of **Adelaida Kemilembe Masilingi V. Advela K. Rugalabamu**, (PC) Civil Appeal No. 16 OF 2019, High Court, Bukoba Registry at

Bukoba, (Unreported), Hon. Kilekamajenga, J., while discussing the issue of failure to record assessors' opinions held that, I quote:-

"In my view, where there is no dissenting opinion, the magistrate does not need to state the opinion of each assessor because all members of the court agreed on one decision."

The Court of Appeal of Tanzania when confronted with the same issue in the case **Neli Manase Foya V. Damian Mlinga**, [2005] T.L.R. 167 held that:-

"As for the Assessors opinions, it is nowadays not necessary to write Assessors opinion provided they sign the judgment of the Court to certify that they agree with it."

In the case at hand, the record of the Primary Court Proceedings shows that the assessors were of opinion that the Respondent be compensated for his money. Reading the judgment of the Primary Court it reflects the opinion of the assessors that the respondent has to be paid by the appellant. The content of the judgment shows that the decision was reached in consensus by the Magistrate and assessors.

On the issue that assessors whether afforded opportunity to ask question to the witnesses during trial, the settled position is that the record of proceedings has to show specifically as to how each among the assessor participated in asking questions. Assessors are members of the Primary Court and are empowered or

required to participate in the decision making process and finally sign the judgment of the court as it was held in the case of **Neli Manase Foya v. Damian Mlinga [2005] TLR 167.**

Court of Appeal discussed the involvement of the assessors in the High Court in the case of **Abdallah Bazamiye and Others v. Republic [1990] TLR 42.**

The Court of Appeal held that:

"Very briefly, denying the assessors the opportunity to put questions, as we are satisfied was the case in the proceedings below, means that the assessors were excluded from fully participating in the trials; so to the extent that they were so excluded, and denied their statutory right, they were disabled from effectively aiding the trial judge who could only benefit fully if he took into judicious account all the views of his assessors and those would only emerge from their own appreciation of the case as a whole."

Despite the fact that the Court of Appeal in the above cited case was discussing the role of assessors in the trial before the High Court, the assessors before the Primary Court have the similar and more duties during trial before Primary Court. Assessors in the primary court are not mere advisers since their powers in a trial and the powers of the magistrate are almost equivalent as it was held in the case of **Mariam Ally Ponda v. Kherry Kissinger Hassan [1983] TLR 223.** Their questions to witnesses and general involvement in the trial has to appear on the record because of the responsibility they share in the court's decision. Failure to afford the assessors with the opportunity to put

questions means that the assessors were excluded from full participation in the trial. The Court of Appeal was of similar position when discussing the role of assessors in the District Land and Housing Tribunal in the case of **Awiniel Mtui and 3 Others v. Stanley Ephata Kimambo**, (Supra), where it held that:-

".....we are of the view that it was wrong, as the record should have shown specifically as to how each among members participated in asking questions."

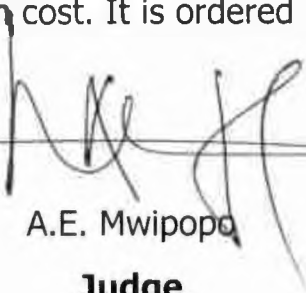
From above cited decision, the failure of the record of the trial Court to show specifically as to how each among members participated in asking question is fatal omission. And this vitiates the whole proceedings before the trial Primary Court.

In the case at hand, the record of trial Primary Court does not show at all if the assessors were afforded opportunity to ask witnesses questions. The only thing which suggest probably the assessors or the trial Magistrate asked question to witnesses is the heading of paragraph in the proceedings after witnesses have completed to testify before the Court which is written "issues by Court" (hoja za Mahakama). This is seen in page 13, 15, 22 and 25 of the typed proceedings of the Primary Court. This could not be said that the record of the trial Court show specifically as to how each among members participated in asking question. If one or all assessors do not have any question, the record was supposed to show NIL after recording the name of the assessor. Thus, I find that assessors in this matter

were not fully involved in the trial by the trial Primary Court and this vitiates the whole proceedings before the Primary Court.


Therefore, the appeal is partly allowed. The proceedings before the trial Primary Court and the District Court are quashed and its decisions are set aside. The matter is reverted back to the Primary Court to start afresh before another Magistrate and the case has to proceed according to the current position of the law. As the first ground of the appeal has disposed of the matter, the remaining grounds of appeal will not be determined. In the circumstances of this case, each party has to take care of his own cost. It is ordered accordingly.




A.E. Mwipopo
Judge
01.04.2022

The Judgment was delivered today, this 01.04.2022 in chamber under the seal of this court in the presence of the Appellant, Respondent and the counsel for the appellant. Right of appeal explained.




A. E. Mwipopo
Judge
01.04.2022