

IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA

HC CIVIL APPEAL NO. 37 OF 2021

*(Arising from Civil Case No. 77 of 2021 at Resident Magistrate
Court of Mwanza.)*

**THE BOARD OF TRUSTEES OF
NATIONAL SOCIAL SECURITY FUND-----APPELANT
VERSUS
M/S JASSIE & CO. LIMITED-----RESPONDENT**

JUDGMENT

Last Order: 09.02.2022

Judgement Date: 14.02.2022

M. MNYUKWA, J.

This is the first appeal whereby the appellant is challenging the decision of the Resident Magistrate Court of Mwanza which decided the case against his favour in Civil Case No 77 of 2021. That, the appellant instituted the suit against the respondent prayed the trial court to enter judgement and decree against the respondent on the following;



- i. The respondent be ordered to pay the appellant the outstanding arrears of statutory contributions amounting to Tsh 50,142,430/- covering from April 2016 to December 2016,
- ii. The respondent be ordered to pay statutory penalties of 5% compound interest for each month of a delay from the date of full pay,
- iii. The respondent be ordered to pay costs of the suit and
- iv. Any other reliefs the honourable court may deem fit and just to grant

The facts which gave rise to the decree, the subject matter of Civil Case No 77 of 2017 and consequently, this appeal can be briefly stated as follows; the appellant instituted a suit against the respondent who is a duly registered contributing employer with the appellant's fund having Registration No 090182. Thus, the respondent was legally required to register her employees with the plaintiff fund and remitting monthly statutory contributions.

That, sometimes on 21 April 2017 the appellant's inspector visited the respondent premises and conducted routine inspection to her records to ascertain the contribution compliance status. After the inspection, the



appellant claimed that the respondent breached her duty to remit statutory monthly contributions of her employees for the period of April 2016 to December 2016 amounting to Tsh 50,142,430/=.

The appellant alleged that despite being served with demand notice, the respondent failed to remit arrears of contribution for her employees as he was entitled to pay a monthly contribution. The respondent denied the claim of the appellant on the assertion that the assessment of the total amount claimed by the appellant includes a list of members who are not her employees.

From the record, when the suit was heard before the trial court the appellant called one witness who adduced oral testimony and tendered four exhibits. On his part, the respondent called one witness who orally testified on the claim filed by the appellant.

Giving evidence in support of the appellant's claim, PW1, a compliance officer from appellant fund who was led by Ms. Zainab Juma, learned state attorney averred that, after her office conducted a routine statutory inspection, they have discovered that the respondent did not remit monthly statutory contributions from April 2016 to December 2016 which makes arrears of Tsh 50,142,430/-. To support her evidence PW1



tendered schedule of arrears which shows the above stated claimed amount and the same was admitted as Exhibits P3. In her evidence, PW1 claimed that the number of the respondent's employees was 67 and that the above-claimed amount of money is the total arrears for all employees. PW1 also tendered respondent's registration form to the appellant's fund admitted as Exhibit P1, notice of statutory inspection, inspection report and exit meeting that were admitted as Exhibit P2 collectively, a schedule of arrears of statutory contribution admitted as Exhibit P3 and the demand notice that was admitted as Exhibit P4.

On the other hand, in his defence, the respondent witness, DW1, an accountant, admitted to be a registered member of the appellant's fund but denied the amount claimed by the appellant. He testified that the number of employees in their company range between 32 to 35 and therefore depending on the salary of each employee, the total arrears of which they were supposed to pay between April 2016 to December 2016 would not exceed 18,000,000. In his evidence, DW1 did not tender any Exhibit.

In reaching its decision, the trial court framed two issues which were



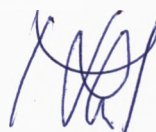
1. Whether the respondent owes the plaintiff a statutory contribution of Tsh 50,142,430/=?

2. To what reliefs are the parties entitled

After a full hearing, the appellant's prayers were not granted as prayed on the reason that he failed to prove the number of employees to be 67 since Exhibit P1 and P2 shows that the respondent's employees range between 32 to 35 and since their monthly contribution was Tsh 2,044,900, for the period of April 2016 to December 2016 the total arrears claimed by the appellant would not exceed Tsh 18.396,000/=.

Dissatisfied with the decision, the appellant preferred an appeal to this Court by advancing four grounds in his Memorandum of Appeal as follows;

1. That, the trial magistrate erred in law and fact by failing to take into consideration evidence tendered by the appellant and as a result, it reached to a wrong decision
2. That, the trial magistrate erred in law and fact by delivering judgement and decree without considering the uncertainty/paucity of respondent's evidence



3. That, the trial magistrate erred in law and fact by delivering judgement and decree without carefully analysing the merits of evidence produced by the respondent
4. That, the trial magistrate erred in law and fact by being biased during the delivering of judgement and decree

During the hearing of appeal, the appellant was represented by Mr. Godfrey Paul Ngwembe assisted by Ms. Aisha Machupa, both the learned state attorneys while the respondent was represented by Ms. Susan Gisabo, learned advocate. The appeal was argued orally.

When he was given a floor to submit on appeal, Mr. Godfrey Paul Ngwembe consolidated the second and third ground of appeal to form one ground of appeal and abandoned the fourth ground of appeal.

Submitting on the first ground of appeal, the learned counsel for the appellant stated that, the appellant sufficiently proved its case before the trial court through the evidence of PW1. He went on that it is trite law that the decision of any court needs to be grounded by the evidence adduced during the trial. He enlightens that the above assertion is the position of law in the case of **Shamsa Khalifa and two others vs**



Suleiman Hamed, Civil Appeal No 82 of 2012 quoted by approval in the case of **Ismail Rashid vs Mariam Msati**, Civil Appeal No 75 of 2015.

The counsel for the appellant added that, it is also trite law that the trial court has a duty to evaluate the evidence as a whole as it is provided in the case of **Okech Okale vs R**, 1965 EA. He insisted that it is wrong to evaluate evidence in isolation and that failure of the trial court to evaluate evidence as a whole may amount to improper justice. He buttresses his position by citing the case of **Manju Salum Msambya vs AG and Another**, Civil Appeal No 2 of 2002 CAT at Mwanza, in which it was held that, what is required is a critical analysis of evidence of both sides and not a critical analysis of evidence in isolation.

He went on to aver that in our case at hand the trial court analysed evidence in isolation by failure to take into consideration the evidence of the appellant despite the fact that the same was corroborated by four exhibits. He added that the wording of the trial court on page 3 and 4 of the judgement are unwarranted and unjudicial for failure to consider evidence admitted in court. He insisted that it is a cardinal principle that the court must conduct its proceedings and make its decision on the basis of the admissible evidence brought before it. He supported his argument



by citing the case of **Kakanga Kabuka vs Mwinong'onenge Chege**, Civil Appeal No 3 of 2000, CAT at Mbeya and the persuasive decision of the Court of Appeal in the case of **Hussein Iddi & Another, vs R**, 1986 TLR 166.

He retires his submission on the first ground of appeal praying before this Court to allow the appeal and quash the judgement and decree of the trial court.

On the consolidated ground of appeal, the counsel averred that it is the evidential principle that the burden of proof in civil cases is on the balance of probability as per sections 110, 111 and 112 of the Evidence Act, Cap 6 R.E 2019. He went on that the appellant through oral and documentary evidence substantially proved the existence of the claimed amount during trial. He went on that the appellant proved the claimed amount by tendered Exhibit P1 to P4 while the respondent failed to prove that their employees' range between 32 to 35 to negate the schedule of arrears submitted by the appellant. He added that the respondent failed to prove that they usually remit monthly contributions to the tune of Tsh. 2,044,900/= as per the usual conduct of business and also, they failed to prove that the outstanding claimed amount cannot exceed 18, 396,000/=.



He went on to state that, section 110(2) of the Evidence Act, Cap 6 R.E 2019 requires a party in civil proceedings to prove the existence of any fact. When such a party has given sufficient evidence to entitle him or her judgement if no further evidence were given, the burden of proof shifts to the other party as per section 112 of the Evidence Act, Cap 6 R.E 2019. He added that it is a trite law that in civil proceedings where any fact is specifically within the knowledge of that person the burden of proving is within that person. He retires his submission on this ground by averred that the trial court delivered its judgement without considering the merit of the evidence adduced before it.

Responding to the appellant's submission, the counsel for the respondent submitted that the trial magistrate properly evaluated the evidence and reached his decision based on the evidence tendered before it. She went on to state that when going through page 3 of the trial court's judgement, the Hon. Magistrate showed the discrepancies of the appellant's documentation after considering the defence evidence. She went on to state that when looking at page 26 of the trial court's proceedings, the appellant's witness admitted the calculation made by the



respondent that the amount claimed to be Tsh 18,000,000/= and there was no examination done by the appellant to her witness.

The counsel for the respondent further stated that the case of **Shamsa Khalifa** cited by the counsel of the appellant is distinguishable in our present case because it deals with improper evidence of which the court can always not rely on it. She added that DW1 was a proper witness and his evidence was watertight. She retires her submission by praying the first ground of appeal to be dismissed.

On the consolidated ground of appeal, she submitted that the exhibits tendered by PW1 has a lot of discrepancies which resulted in her failure to prove the claimed amount. She added that it is a trite law that the one who alleges must prove his allegation. She supported her argument by referring to the case of **Hemed Said vs Mohamed Mbilu** TLR (1984) 13 in which the court held that the burden of proof is on the balance of probability and therefore it was the duty of the appellant to prove his case on a balance of probability.

The counsel for the respondent contradicts the act of the appellant to shift the burden of proof to the respondent. She cited the persuasive decision of this court in the case of **Ezekiel Magesa vs Geita Gold Mine**



LTD, Land Case No. 13 of 2018 in which the Court held that the plaintiff cannot rely on the weakness of the defence case to prove his claim.

She finalizes her submission by averred that, parties are bound by their pleadings and she prayed the appeal to be dismissed with costs and the decision of the trial court to be upheld.

Re-joining, the appellant's counsel reiterated his submission in chief and added that, according to section 61 of the Evidence Act, Cap. 6 RE 2019 it is clear that the respondent failed to prove his case. He went on to state that section 63 of the same Act provides that the document can be proved by secondary and primary evidence.

The counsel went on to state that the cited case of **Shemsa Khalifa** is relevant to our case at hand. He also went on disputing the assertion that PW1 admitted the claimed amount stated by the respondent. He added that the respondent was required to prove the discrepancies by adducing documentary evidence. He insisted that the appeal be allowed with costs.

Having considered the rival submissions of the learned counsel for the parties and after having gone through the available record, my mind is settled that it is not disputed that the respondent is a registered



contributing employer to the appellant's fund, it is also not disputed that the respondent did not remit monthly contribution to the appellant for a period of April 2016 to December 2016. What is disputed is whether the total number of the respondent's employees were 67 or a range between 32-35. It is the number of the employees of the respondent which can determine the amount claimed by the appellant. Hence, to my view this is the central issue for consideration and determination in this appeal and if at all the same number has been sufficiently proved by the parties.

I am mindful with the long-established and settled principle of law that this Court being the first appellate court has the power to reconsider and re-evaluate the trial court's evidence and if warranted, draw its own conclusions if it is established that the trial court failed to appreciate the weight of the evidence tendered before it. See the case of **Yohana Dionick and Shija Simon vs R**, Criminal Appeal No 114 of 2015 and the case of **Jumanne Salum Pazi vs R** (1981) TLR 246

In the present case what triggered the dispute which is the subject of the present appeal before me is the findings of the Inspection Report conducted by the appellant because the same report shows that the respondent's employee to be 67 and the total of arrears of statutory



contributions as evidenced in the schedule of arrears was Tsh 50,142,430/=

For the purpose of my convenience, in disposing of this appeal I wish to start my discussion with the consolidated ground of appeal and then conclude with ground one of appeal as posed by Mr. Godfrey Paul Ngwembe in his memorandum of appeal.

It is a cardinal principle of law that the one who alleges must prove his allegation. In our present case by view of section 110 of the Evidence Act, Cap 6 R.E 2019, whoever desires any court to give any judgement as on the facts the person asserts, to any legal rights or liability, must prove that such facts exist. This is principally known as the burden of proof.

It is also a settled principle of law that in civil cases the one who files a suit has a responsibility to prove the facts claimed in the suit on the balance of probability. That is to say that the party need to prove whatever he asserts in the court with the help of witnesses and supporting documents if need arises.

Upon going through the entire record of the trial court, it is vividly clear that the plaintiff managed to submit the documents to substantiate his claim. I say so because it is on record that before the appellant conducted



the so-called statutory inspection, he served the notice of statutory inspection to the respondent and the same was admitted by the trial court as Exhibit P2 collectively.

The said notice among other things requires the respondent to extend maximum cooperation to the appellant when conducting inspection and availed all the necessary documents and information whereby specifically the respondent was required to prepare some documents for verification. Among other documents, the notice required the respondent to avail all register of employees, wages records, records of NSSF, PPF, PSPF, LAPF and GEPPF, income tax returns, payroll and master roll, schedule of contributions and any other necessary document for inspection.

It is my understanding that, the said notice serves a useful purpose to the respondent as it informs him about the inspection exercise to be conducted which essentially avoid taking him by a surprise.

The available record also shows that the inspection report was tendered by the appellant in the trial court and the same was not objected by the respondent and it was admitted as Exhibit P2 collectively. The inspection report among other things indicated that the respondent had 67 registered employees to the fund, and that the last contributions made



by the respondent was in March 2016 and that the arrears of contribution from April 2016 to December 2016 was a sum of Tsh 50,142,430/=

The records further provides that there was an exit meeting which confirms that the fund inspector visited the respondent premises for conducting a routine inspection. The exit meeting was also among the document admitted as Exhibit P2 collectively. From there, the other document that was admitted by the trial court as Exhibit P3 was a schedule of arrears of statutory contribution from April 2016 to December 2016. The schedule of arrears indicated the total number of the respondent's employees to be 67 and the total arrears to be Tsh 50,142,430/=.

In view of the sequence of events, it is my considered view that the schedule of arrears tendered by the appellant was the result of the findings of inspection conducted in the respondent's premises after being supplied by the documents requested in the notice of statutory inspection.

On that basis, it is my firm view that, on his part the appellant discharged his burden of proving the existence of 67 employees and the claimed amount of Tsh 50,142,430/=. If the respondent contradicts, then



the burden of proof shifts to him to rebut the fact or show contradictory evidence on the evidence tendered by the appellant.

The shifting of the burden of proof has been stated by the Court of Appeal of Tanzania in the case of **Martha Mshote vs Edson Emmanuel & 10 others**, Civil Appeal No 121 of 2019 CAT at Dar es Salaam (unreported) that:

*"... **the burden of proof never shifts to the adverse party until the party on who the onus lies discharge the burden.** It does not cease on account of the weakness of the case of the adverse party. (Emphasis is mine on the bolded words)*

In addition to that, the Court of Appeal of Tanzania in the case of **Paulina Samson Ndawaya vs Theresia Thomas Madaha**, Civil Appeal No 45 of 2017 (unreported) as quoted with approval in the case of **Martha Msote** (supra), observed that:

"In our view, since the burden of proof was on the appellant rather than the respondent, unless and until the former had discharged hers, the credibility of the respondent was irrelevant. ..."

Guided by the above case laws, I proceeded to determine the circumstancing prevailing in our present case. It is vividly clear based on



the available record that the respondent asserts that the number of his employee ranges between 32 to 35. However, there is no any proof to that effect apart from the oral testimony of DW1. Since the proof of civil cases is on the balance of probability, then the respondent is duty-bound to tender affirmative defence to prove his assertion. That is to say, in view of section 115 of the Law of Evidence Act, Cap 6 R.E 2019, the respondent is obliged to prove the assertion that his employees range between 32 to 35.

For that reason, it was expected that the respondent could have kept the records of his employees and contribution to the appellant's fund and submitted the same before the trial court to contradict the claim of the appellant on the number of his employees. It is doubted if it is true at all that the respondent has no any records to show the number of his employees.

It goes without saying that if the respondent disputed the number of employees claimed by the appellant on the reason that some of the employees were not on his register, he could have clearly substantiated his assertion by submitting any document to that effect including but not



limited to either a payroll, resignation or termination letters if some of them were no longer his employees.

Since the evidence on record show that the respondent failed to discharge his burden, my mind is settled that the appellant managed to prove his case on the required standard since it is a trite law that in civil cases the standard of proof is on the balance of probabilities and that the court will sustain such evidence which is more credible than the other on a particular fact to be proved. (See the case of **Agatha Mshote** cited above). In my final analysis therefore, I proceed to allow the 2nd and 3rd consolidated ground of appeal as combined by the learned counsel for the appellant.

Coming to the first ground of appeal which claimed that the trial court failed to evaluate the evidence adduced before it. On this ground, I fully subscribe to what has been submitted by the appellant counsel that the duty of the trial court is to evaluate the evidence as a whole. As it was rightly submitted by the appellant's counsel, the same has been pointed out in the case of **Okech Okale vs R** (1965) EA 555.

When I revisited page 4 of the trial court's typed judgement it clearly shows that the trial magistrate considered only exhibit P1 and P2



collectively and with no reason left out exhibit P3 which is the schedule of arrears of contributions. Surprisingly, the trial magistrate did not comment anything on exhibit P3 though the same was admitted before the trial court.

As it was rightly submitted by the appellant's learned counsel and supported by the case of **Manju Salum Msambya vs The Attorney General and Another**, Civil Appeal No 2 of 2002, CAT at Mwanza that, it is very wrong to evaluate evidence from one side in isolation because every single piece of evidence should be weighted to the rest of the evidence.

Furthermore, upon going through Exhibit P2 I didn't find anywhere which stated that the number of the respondent's employees range between 32 and 35. Additionally, Exhibit P2, specifically the Exit meeting was endorsed by the respondent without any rebuttal of the inspection report by another documentary evidence to show the total number of employees to range between 32 to 35.

On that basis, it is my considered view that it was wrong on the part of the trial court to have failed to consider the oral and documentary evidence tendered before it by the appellant. Since the proof on the



number of employees was done through the documentary evidence, the same could not be overridden by an oral account as asserted by the respondent.

In the final analysis, I hereby allow this appeal and proceed to set aside the judgment and decree of the trial court. The respondent is ordered to pay the amount of money claimed by the appellant which is Tsh. 50,142,430/=. Costs of this appeal to be borne by the respondent.


M.MNYUKWA
JUDGE
14/02/2022

Right of appeal to the Court of Appeal explained to the parties.


M.MNYUKWA
JUDGE
14/02/2022



Judgement delivered on 14th day of February 2022 via audio teleconference in the presence of appellant's counsel and on the absence of the respondent.


M.MNYUKWA
JUDGE
14/02/2022