

IN THE HIGH COURT OF TANZANIA

(IN THE MWANZA SUB-REGISTRY)

AT MWANZA

PC CIVIL APPEAL NO. 04 OF 2023

(Originating from Civil Appeal No. 15 of 2022 in Ukerewe District Court at Ukerewe and Civil Case No.

25 of 2022 in Ilangala Primary Court at Ukerewe)

JOSEPH ATHANAZI.....APPELLANT

VERSUS

MAKENE MUSIMU.....RESPONDENT

JUDGMENT

Date of Last Ruling: 24/03/2023

Date of Judgment: 19/05/2023

Kamana, J:

This is a second appeal. In the trial Court, Makene Musimu, now the Respondent, sued unsuccessfully Joseph Athanazi, now the Appellant, claiming Tshs. 6,000,000/-being payments for hiring a boat engine for thirty months. Further, the Respondent claimed from the Appellant Tshs. 175,000/- for spare parts of the said engine.

Facts gathered from the records are to the effect that on 11th December, 2019, the Respondent hired out his boat engine to the Appellant on the understanding that the latter will use the engine for the period of two months. It was agreed that the Appellant would pay the Respondent Tshs. 200,000/- a month for using the said engine. It was

not in dispute that the Appellant paid a total of Tshs.400,000/- for the deal. The agreement was witnessed by one Shulughu Hamisi Ndalo, Ward Executive for Namilembe Ward in Ukerewe District.

Facts reveal further that the Respondent, after the lapse of the contractual period, started to make a follow up about the engine but the Appellant refused to return the same. Aggrieved, the Respondent reported the matter to the Ward Executive who witnessed the agreement and advised him to institute a suit against the Appellant.

It was the Defence case that after the expiry of two months, the Appellant tried in vain to request the Respondent to take his engine but the latter did not heed to that request. According to the records, the Appellant did not adduce any evidence to prove the fact that he requested the Appellant to take the engine.

Based on the evidence adduced before it, the trial Court entered a decision in favour of the Appellant. The trial Court reasoned that at the expiry of the agreement, no further agreement was entered by the parties. The trial Court went on to reason that the expired agreement did not contain an automatic renewal clause to warrant claims by the Respondent. It was the holding of the trial Court that the Respondent

failed to prove that in the period of 30 months, the said engine was in use.

Aggrieved by that decision, the Respondent appealed to the Ukerewe District Court which reversed the decision of the trial Court. In its judgment, the first appellate Court reasoned that since the Appellant had the engine after the expiry of the agreement without the Respondent's consent, he is liable to compensate the Respondent to the tune of Tshs.6,000,000/- being payments for hiring the engine for 30 months and Tshs. 175,000/- being payments for mechanical defects.

The decision of the first appellate Court did not amuse the Appellant hence this appeal which was predicated on three grounds of appeal as follows:

1. That the first appellate Court erred in law and fact on the evaluation of evidence in the record and making findings thereof.
2. That the first appellate Court erred in law and fact in awarding Tshs. 6,175,000/- as compensation without proof of evidence.
3. That the first appellate Court erred in law and fact by basing its decision on the fact the engine was in the

Appellant's possession without considering the whole evidence in the record.

At the hearing of this appeal which was argued orally, the Appellant had the services of Mr. Victor Karumuna, learned Counsel. The Respondent was represented by Mr. Sijaona Revocatus learned Counsel.

Submitting in support of the appeal, Mr. Karumuna, learned Counsel prefaced by abandoning the third ground of appeal and adding a new ground of appeal to the effect that the contract between the parties had no automatic renewal clause.

Arguing the first ground, the learned Counsel contended that the first appellate Court did not properly evaluate the Appellant's evidence that he failed to enter into a new agreement with the Respondent due to low season so far as fishing was concerned and the failure of the Respondent to take his engine after being requested by the Appellant. He contended that the first appellate Court considered and gave weight to the Respondent's evidence. Mr. Karumuna submitted further that had the first appellate Court given weight to the evidence of both parties, it would have not reached such a decision. To substantiate his arguments, the learned Counsel invited this Court to consider the Agreement

(Exhibit P1) which states that the Respondent was the one responsible for renewing the Contract.

Concerning the second ground of appeal, Mr. Karumuna, learned Counsel submitted that there was no evidence adduced by the Respondent to prove the damages of Tshs. 6,175,000/-. He argued that since the agreement was for a period of two months, there is justification for the Court to order that the Respondent be paid the said sum.

Regarding the newly added ground, I do not see a reason to reflect the same in this judgment as it was submitted contrary to the procedures relating to the addition of new ground of appeal as it was submitted from the bar and hence taken to be a surprise to the adversary party.

Responding to the first ground of appeal, Mr. Revocatus, learned Counsel for the Respondent contended that the first Appellate Court properly evaluated the evidence of both parties adduced at the trial. He referred this Court to pages 10,11 and 12 of the judgment as depicting the evaluation of the evidence.

Regarding the second ground, the learned Counsel contended that the Appellant had the obligation to return the engine to the Respondent

if he had no intention to continue with the new agreement. In that case, the learned Counsel thought that the failure on the part of the Appellant to return the engine means that there was an implied contract. He contended that his client anticipated that the Appellant has entered into a new agreement.

Mr. Revocatus submitted further that the renewal of the agreement depended on both parties. In that case, he opined that if the Appellant did not intend to renew the agreement, he was under the obligation to return the engine to the Respondent. Failure to return the engine, according to the learned Counsel led the Respondent to assume that there was a renewal of the agreement. It was against that background, the learned Counsel contended that the Appellant is liable to pay Tshs. 6,175,000/- for the period he had the engine in his possession. To buttress his opinion, the learned Counsel referred this Court to the case of **Juma Mabimba v. Samwel Pompido**, PC Civil Appeal No. 48 of 2019. In summing up, Mr, Revocatus, learned Counsel contended that the Appellant during the trial did not adduce any evidence to prove that he tried to contact the Respondent with a view to returning the engine.

Rejoining, Mr. Karumuna, learned Counsel for the Appellant contended that there is sufficient evidence that his client tried in vain to

locate the Respondent with a view to returning the engine after the lapse of the period of two months.

Having heard the rival arguments, the task I am entrusted to discharge is to determine the merits of the appeal. Concerning the first ground of the appeal, I should hasten to state that the first appellate Court, as a matter of principle, is obliged to reevaluate the evidence adduced in the trial Court and come to its conclusion. This position has been accentuated in multitudinous cases including the case of **Kaimu Said v. Republic**, Criminal Appeal No 391 of 2019 where the Court of Appeal pronounced:

'We understand that it is settled law that a first appeal is in the form of a re-hearing as such the first appeal court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own finding of fact, if necessary.'

See: Leonard Mwanashoka v. R, Criminal Appeal No. 226 of 2014; **Rashid Abiki Nguwa v. Ramadhan Hassan Kuteya and Another**, Civil Appeal No. 421 of 2020 and **Cheyonga Samson @Nyambare v. R**, Criminal Appel No. 510 of 2019.

Dispassionately, I have gone through the judgment of the first appellate Court and concluded that the first appellate Court did a

commendable job of summarizing the evidence adduced by both parties during the trial. However, respectfully, I hold the view that the first appellate Court, as rightly contended by Mr. Karumuna, failed considerably, to reevaluate the evidence adduced by the Appellant during the trial specifically on why he failed to return the engine to the Respondent.

It has been a trite principle in this jurisdiction that the summarization of evidence adduced during the trial is insufficient to make the judgment of the trial or the appellate Court a complete one if no evaluation or reevaluation, as the case might be, is not done. The absence of an evaluation of evidence may lead to a wrong conclusion. In the case of **Leonard Mwanashoka v. R.** (Supra), the Court of Appeal had this to state:

'Failure to evaluate or an improper evaluation of the evidence inevitably leads to wrong and/or biased conclusions or inferences resulting in miscarriages of justice. It is unfortunate that the first appellate judge fell into the same error and did not re-evaluate the entire evidence as she was duty bound to do. She did not even consider that defence case too. It is universally established jurisprudence that failure to

consider the defence is fatal and usually vitiates the conviction.'

My perusal of the judgment of the first appellate Court specifically on pages 10, 11 and 12 reveals that the Court did not re-evaluate the evidence of the Appellant that was summarised on page 4 of the judgment. This is fatal and vitiates the whole judgment. Given that, it is my opinion that there is no judgment worth to be determined by this Court.

Consequently, I do not see any reason to determine the second ground of appeal. I remit the file to the first appellate Court for recomposition of the judgment. Any party aggrieved by the recomposed judgment may appeal. Order accordingly.

Right To Appeal Explained.

DATED at **MWANZA** this 19th day of May, 2023.



A handwritten signature in blue ink, appearing to read 'KS Kamana', written over a horizontal line.

KS KAMANA

JUDGE