IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT DODOMA

PC. CIVIL APPEAL NO. 16 OF 2022

CAROLINE DAVID MSENGI.....APPELLANT

VERSUS

ZAKAYO FREDY MOSHI.....RESPONDENT

(From the Judgment of Iramba District Court-S. W. Nindi-RM)

Dated 13th day of January, 2022

In

Civil Appeal No. 10 of 2021

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JUDGMENT

02nd May &05th June, 2023

MDEMU, J:.

In Shelui Primary Court, the Respondent herein lodged a claim against the Appellant for the payment of Tshs. 5,000,000/=. The claim arose from an agreement the two entered in which the Appellant was to supply 150,000 kilograms of soft bran of rice at the price of Tsh. 19,500,000/=. Parties agreed further that, the Appellant should supply 30,000 kilograms per week. Following this arrangement, The Respondent gave the Appellant Tshs. 11,700,000/= being money for three trips. In response, the Appellant supplied only two trips having 56,780 kilograms instead of 60,000 kilograms of which, the Respondent was not contended of its quality and standard as agreed. Thereafter, the Appellant didn't

supply the third trip hence the Respondent decided to file civil case No. 57 of 2021 at Shelui Primary Court to be paid back Tshs. 5,000,000/= for the consignment not delivered to him. The trial Court awarded the Respondent Tshs. 2,000,000/=. The Appellant was aggrieved, thus appealed to the District Court which varied the decision of the trial Court ordering the Appellant to pay the Respondent Tshs. 4,357,600/= hence, this appeal on the following grounds: -

1. *That, the District Court erred in fact and in law for holding that, parties hitherto entered into soft rice bran's agreement without credible evidence to justify his findings.*
2. *That, both subordinate courts erred in law and fact for holding that, the Appellant's animal feeds (pumba) were of low quality, in absence of any credible and cogency proof as to the defectiveness of the said "pumba"*
3. *That, both subordinate Courts grossly erred in law for shifting legal burden of proof as to whose party supposed to prove that the said animal feeds were of good quality, between the Respondent and Appellant thus to come out with unjustifiable decision.*
4. *That, the District Court erred in law and in fact for holding that, appellant violated terms of agreement for failure to supply the said rice bran as agreed, without*

any written proof of the said contract, thus to arrive at unreasonable decision.

5. *The District Court erred in law and in fact for condemning the Appellant to return Tshs. 4,357,000/= in total disregard to the extent of loss suffered after Respondent defiled to load the three remaining trips of the said rice bran(pumba).*

On 23rd of February, 2023, I heard the parties. The Appellant was represented by Mr. Leornard Haule, learned Advocate and the Respondent appeared in person. Supporting the appeal, Mr. Haule abandoned ground number one. Arguing on the second ground, he submitted that, in terms of section 110 of Evidence Act, Cap. 6, he who alleges must prove. On the issue that animal feeds (pumba) were of low quality, he said that, the same was not proved by the Respondent for want of agreed standards. He said therefore, the trial Court erred in trusting the Respondent's evidence. He also added that, the act of the Respondent receiving animal feeds and selling indicates that, it was of standard required and if not, then the Respondent was not supposed to receive and sell the same.

On the third ground of appeal, he argued that, it was the Respondent's duty to produce certificate of compliance and not the Appellant. He cited the case of **Laurence Magessa Tradig as Jopen Pharmacy vs. Fatuma Omary and Another**, Civil Appeal No. 333 of 2019 (unreported). In his view, the Respondent had only two options; to

reject the whole consignment or to reject part of it which is not up to standard.

Submitting on the fourth ground of appeal, the Learned Counsel argued that, it was the Respondent who breached the contract and not the Appellant. On the last ground, he conceded that, the Respondent advanced the Appellant Tshs. 11,700,000/= for the consignment. However, the Appellant accounted Tshs. 3,801,000/= for production of 27,700 kilograms of consignment; Tshs. 3,741,400 produced 28,780 kilograms for the second phase, Tshs. 4,000,000/= was paid as advance for the hired machines thus making the total of Tshs. 5,000,000/= and Tshs. 357,800/= was for subsistence allowance for her stay at Kahama where production was made. He submitted therefore that, all these expenditures were acknowledged and was never contradicted. In this, he cited the case of **Christopher Marwa Mtulu vs. R,** Criminal Appeal No. 561 of 2019(unreported). He added further that, an order for reimbursement to the Respondent made by the Court is unfounded. He also stated that, non delivery of the third trip was not the Appellant's fault rather the Respondent who refuted the delivery.

In reply, the Respondent submitted that, as to quality and standards of animal feeds; the same was inspected by Masanga and Joseph and the consignment received was a mixed one and not the one inspected by

Joseph. It was his submissions that, both the Appellant and the Respondent were duty bound to ensure the consignment was of the standard required. On the other hand, he said, it was the Appellant who had the milling machines and therefore responsible to verify the complained standards.

Regarding breach of contract, his view was that, it was the Appellant who breached it because, **One,** the consignment was not up to standard. **Two,** the thirty (30) tones per trip were not delivered as agreed, since the first trip was of twenty-seven (27) tones and in the second trip, she supplied twenty-eight (28) tones. The other issue which necessitated breach of contract was in respect of, he said, the delivery was done after the agreed time of seven (7) days. He said all these necessitated the Respondent to breach the contract. He argued further that, there were no machine charges. The whole money advanced was for buying/purchasing the consignment. Mr. Haule reiterated his submissions in chief.

Having gone through the records, petition of appeal and submissions of both parties, the main issue is whether there was a contract between the Appellant and the Respondent, and if the answer is in affirmative, then who breached it and what reliefs the parties are entitled.

There is no dispute that parties entered into contract, in which the Appellant received Tshs. 11,700,000/= from the Respondent being payment for purchase of 90,000 kilogram of soft bran of rice. According to the record, only 55,480 kilograms were supplied, that is, 27,700 in the first trip, and 28,780 in the second trip. In all these two trips, the Appellant was to supply 30,000 kilograms of good quality (soft brans) per trip. In this, the Respondent and other witnesses (SM2 and SM3) testified to the effect that, the first trip, its quality wasn't good and they notified the Appellant to rectify the same. The second trip was even worse according to the Respondent.

Having such facts in the record, the law of contract Act, Cap. 345 R.E 2019, provides in section 37(1) for the duty of parties to the contract to perform their respective promises unless such performance is dispensed with or excused under the provisions of the Act or any other law. For sure, the said promises are found in the terms specified in the said contract or implied by its nature or by law. In it therefore, it is a cardinal principle of law of contract that, parties are bound by their agreements freely entered. Furthermore, it is settled law that, there should be sanctity of the contract compelling parties to honor their obligation under the Contract. In the case of **Abualy Alibhai Aziz vs. Bhatia Brothers Ltd** [2000] T.L.R 288, it was held that:

The principle of sanctity of contract is consistently reluctant to admit excuses for non- performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement.

In the present case, the evidence available on record shows that, it was the Appellant who breached the terms of contract by not suppling 30,000 kilogram as they agreed and no notice/information was given prior that, the said kilograms are less than agreed. Furthermore, the same was agreed to be derived in seven days but it was not. As to quality of consignment, the same was not agreed and upon receiving the first trip, the Respondent informed to rectify it but the Appellant didn't, rather delivered worse consignment yet. In my view, I see the Appellant to have breached terms of the contract and the Respondent being a businessman had no option rather than cancelling the delivery of the remaining consignment.

The consequences for breach of contract are well provided under the provisions of section 73(1) the Law of Contract Act, Cap. 35 R.E 2019 thus: -

Where a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally

arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Based on the law as stated and as the Appellant was in breach of contract, the Respondent is entitled to compensation.

What amount is to be paid to the Respondent as compensation, is the scope of breach and performance by the other party would tell. The Appellant stated to have used all the money as follows: Tshs.3,601,000/= for the first trip, Tshs.3,741,400/= for the second trip, Tshs. 4,000,000/= for hiring machine, and Tshs. 357,600/= subsistence allowance. All these were raised during her defence. If that was their agreement, I am of the view that, they were to be raised when the Respondent was giving his evidence, short of it, I find them to be an afterthought.

Furthermore, the Appellant didn't cross examine the Respondent when testifying that, the money given to her was for the consignment only. Importantly is this that, the Appellant didn't summon the owner of machine to establish that indeed his machines were hired by both the Appellant and the Respondent. It is settled law that whoever wants the Courts to give verdict in his favor on a certain right or liability depending on the existence of certain facts, must prove that the same do exist. So, the burden of proof lies on that person who alleges. This principle is sourced also from section 110 of Evidence Act, Cap. 6. Moreover, it is trite

law that, failure by a party in a case to call material witnesses allows the court to draw adverse inference on a part whose witnesses were not called.

That said, the appeal is hereby dismissed with costs for want of merits. The Appellant should compensate the Respondent the amount of Tshs. 4,357,600/= for the remaining 33,520 kilograms of bran of rice as decreed by the first Appellate Court.

It is so ordered.

Gerson J. Mdemu

JUDGE

05/06/2023

DATED at **DODOMA** this 05th day of June, 2023

Gerson J. Mdemu

JUDGE

05/06/2023