

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

PC.CIVIL APPEAL NO. 11 OF 2022

*(Originating from Lisekese Primary Court in Civil Case No.78 of 2021 and
Civil Appeal No.15 of 2021 Masasi District Court)*

MWAINI ABDUL MAMUAPPELLANT

VERSUS

KASSIMU ALLY HASSANIRESPONDENT

JUDGEMENT

2/5/2023 & 27/6/2023

LALTAIKA, J.;

This is a second appeal. The appellant herein **MWAINI ABDUL MAMU** is dissatisfied with the decision of the district court of Masasi in Civil Appeal No.15 of 2021 adjudged in favour of the respondent.

The appellant has appealed to this Court on one ground. In spite of grammatical errors, I am inclined to reproduce it for ease of reference as I hereby do;

- 1. That the trial District Court erred in law and facts by overlooking the provision as at by Law (sic!) when had taken into consideration the baseless and incredible evidence from the Respondent's Party (sic!) and disregarding the credible and watertight evidence from the Appellant's Party (sic!). Therefore the Appellant's party (sic!) prays for the partly (sic!) decision to pay Tshs 9,650,000/= to the respondent to be dismissed with costs.*

When the appeal was called on for hearing on both parties appeared in person, unrepresented. With the assistance of this court in elaborating the ground of appeal drafted by a counsel, probably on pro bono basis, in English-a language not understood by either party.

Before moving on to the rival arguments, I consider it imperative to provide albeit briefly the factual backdrop leading to this appeal.

The appellant and respondent are distant relatives. They hail from Masasi District in Mtwara Region. In 2018 the respondent who was living in Dar es Salaam allegedly lent the appellant TZS 9,650,000 for cashew nut business. A total of TZS 4,000,000 was, allegedly, for buying raw cashew nuts from while the rest namely TZS 5,650,000 was for what is locally known as “kula maua” that is to say capitalizing on farmers’ urgent needs for cash to buy their crops before they harvested.

The respondent, a businessman in his fifties, claims that the appellant, a much younger fellow whose family has, allegedly been “assisted several times” by the older and richer distant relative, never honored his promise of repaying the debt amounting to TZS 13,650,000.

Having family structures to persuade the appellant to honor his part of the agreement, the respondent knocked on the doors of Lisekese Primary Court demanding that his cousin be compelled to pay him back the 13,560,000. For reasons that will constitute a large part of this judgement, may it suffice at this stage to state that the Primary Court (the trial court) adjudged in favour of the respondent.

Aggrieved, the appellant took to his heels to the nearby Masasi District Court (the first appellate court) whereupon, the learned Magistrate upheld the decision of the trial court save for minor modification. Particularly, it ordered the appellant to pay TZS 9,650,000 and not TZS 13,650,000 ordered by the trial court. The reasoning of the learned Magistrate is of particular interest to this judgement. I will come back to it later as I deliberate on the proper orders of this court. But before coming to that stage, this court, being a court of record, cannot help but document, albeit in a summarized form, what transpired when this appeal was called on for hearing.

Arguing for his ground of appeal, the appellant stated that he believed the decision of the first appellate court to be erroneous for several reasons. He claimed that the amount of money proved by trial court had already been paid to the respondent through Account Number 70510000487 under the name Kassimu Ally Hassani.

The appellant further stated that he had paid the same amount through his [the appellant's] NMB Agency account Number 7121000962 under the name Mwaini Abdul Mwamu. According to him, there had been an excess of TZS 3,350,000 that was erroneously deposited in the respondent's account, which he deposited on four different dates:

- TZS 5,000,000 on 21/1/2019,
- TZS 4,000,000 on 23/3/2019,
- TZS 2,000,000 on 20/4/2019, and
- TZS 2,000,000 on 9/10/2019,
- Making a total of 13,000,000.

He requested the court to allow NMB Bank personnel to come and prove that the same amount had been received by the respondent.

Additionally, he prayed that the respondent pays the costs of this case and also the excess money he had deposited.

The respondent on his part had much fewer words. He claimed to have given the money in question to the appellant, who is his relative. He explained that he used to work with the appellant's late father and had helped their family on numerous occasions. He further stated that he had given the money to the appellant for good intentions, but the appellant had been behaving erratically and had run away from a family decision that ordered him to repay the money.

The respondent indicated that both lower courts had ruled in his favor. He expressed confidence that the exhibits he had presented in the lower courts would support his claim and that this court too would support the decision of the lower courts.

The respondent reminded this court to note that the first appellate court had reduced the amount from **TZS 13,650,000** to **TZS 9,650,000**, which he said was the final decision of the District Court. He requested that this court ensures that he received his rights and that the costs, including the costs of this case, be paid.

In a brief rejoinder, the appellant claimed that he had taken the money in question in writing and had subsequently returned it to the appellant by depositing it in his account. He insisted that the respondent had no support to claim that he never received the money. The appellant requested that he be reimbursed for the costs of this case and the extra money that he had accidentally paid to the respondent through the NMB Agency machine.

I have dispassionately considered the above rival arguments. I have also taken a rather critical examination of both the trial and first appellate courts. I have read the judgments and familiarized myself with the reasoning of the learned magistrates thereof. I commend them for their commendable efforts in understanding the root cause of the conflict brought before them. Proceedings leave no doubt that the learned trial magistrate actively engaged with parties and recorded their submissions meticulously.

As alluded to above, the finding of both the trial and first appellate courts is to the effect that the appellant is indebted to the respondent. The trial court though the appellant owed the respondent **TZS 13,650,000**. On appeal, the first appellate court reduced the amount to **TZS 9,650,000**. In spite of the difference in the amount payable, the finding that the appellant is obligated to pay the respondent is concurrent.

It is instructive at this juncture to note that I am alive to the legal position pertaining to noninterference of the second appellate court with concurrent facts of the trial and first appellate court. More importantly, I am equally aware of the exception to the general rule. The position is summed up by the Court of Appeal in **Waruku Mwita v. Republic Crim. App. No. 219 of 2012 (unreported)** thus:

"The law is well settled that on second appeal, the Court will not readily disturb concurrent findings of facts by the trial court and the first appellate court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable...are a result of a complete misapprehension of the substance, nature and quality of the evidence, a violation of the principle of law or procedure or have occasioned a miscarriage of justice."

Based on the above authority, I cannot “endorse” the concurrent finding of the lower courts because I am fortified that they are a result of “a complete misapprehension of the substance, nature, and quality of the evidence.” Let me substantiate this claim.

It is on record that the appellant tendered documentary evidence in the form of a printout of a bank statement from NMB Bank. The trial court admitted it as Exhibit SUK1. The learned Magistrate made no attempt to evaluate the evidence. In her 6-page judgement she simply stated:

"Mdaiwa alitoa kielelezo cha bank statement ambacho kilipokelewa na kunakiliwa kama SUK.1 na kielelezo hicho kinaeleza tu kuhusu taarifa za mdaiwa, na hakuna sehemu kilichonyesha hamishololote (sic!) la hela kutoka kwenye akaunti hiyo Kwenda kwenye akaunti nyingine."

On appeal, court records show that the appellant was represented by counsel. The learned counsel (**Mr. Manyanga**) drew the attention of the first appellate court to the documentary evidence hitherto tendered in the trial court. The learned Magistrate came up with an even more perplexing observation as partly quoted bellow:

"What was required for the appellant to prove that the money was fully paid to the respondent through his bank account was to tender pay-in slip bearing the respondent's real names and bank account number, issued, signed and sealed by the banker or its agent with whom the said transaction were affected."

Considering the fact that the appellant had consistently stated that he credited the respondent's account through his own NMB Agency account, the above reasoning by the learned Magistrate is seriously wanting. Requiring the traditional “pay-in slip” without saying why the same is

superior evidence that a bank statement raises a lot of questions. With due respect to the learned Magistrates, this is not how evidence is evaluated.

The art and craft of evaluating evidence, which is not peculiar to courts involves evaluating, among other things:

- (i) *The source of the evidence (where it comes from, who took over from who and who has tendered it in court)*
- (ii) *The nature of the evidence (whether primary or secondary)*
- (iii) *How the evidence compares with the rest of evidence in the same transaction/matter (whether there is corroboration)*
- (iv) *How current is the evidence (whether it is still valid, or another evidence makes it redundant),*
- (v) *The scope of the evidence (whether it proves a specific or a general item, direct versus circumstantial aspects)*
- (vi) *What the evidence suggests (inference)*
- (vii) *Whether the evidence is a part of common knowledge or new scientific/technological findings.*

(See generally Damaska, Mirjan *Evaluation of Evidence: Pre-Modern and Modern Approaches* (Cambridge: Cambridge University Press 2019).

It goes without saying that failure by the lower courts to properly evaluate the evidence makes their decisions defective and seriously lacking in reasoning. The Court of Appeal in **Mkulima Mbagala v. Republic Crim. App. 267 of 2016** had stated as quoted bellow on what a reasoned judgement is made of:

"For a judgement of any court of justice to be held to be a reasoned one, in our respectful opinion, it ought to contain an objective evaluation of the entire evidence before it...In short such an evaluation should be a conscious process of analyzing the entire evidence dispassionately in order to form an opinion as to its quality before a formal conclusion is arrived at."
(Emphasis mine)

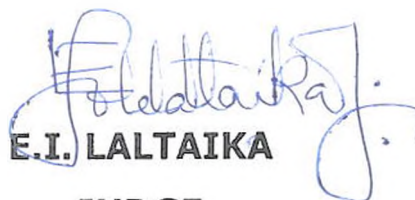
It is very unfortunate that the dispute remains unresolved due to inability of the learned Magistrates to walk an extra mile to evaluate, analyze and consider a documentary evidence whose author could simply be summoned to prove authenticity or otherwise. Due to this gross and unjustifiable omission, an order for retrial is warranted.

I am alive to the settled position of the law that an order for a retrial arises when the appellate court finds out that the judgment of the trial court is defective for leaving contested material issues unresolved and undecided which error or omission renders the said judgment a nullity and incapable of being upheld. See, **Stanslaus Rugaba Kasusura & Attorney General vs Phares Kabuye** [1982] T.L.R. 192. See also **Fatehali Manji versus Republic** (1966) EA 344.

Premised on the above, I hereby **nullify and set aside the Ruling and order(s) in Civil Appeal No.15 of 2021 Masasi District Court.** Further, I order Civil Case No.78 of 2021 be retried with the following directives: **one**, the trial court should dispassionately evaluate, analyze, and consider the evidence tendered as the basis for arriving to a just decision. **two**; to write a reasoned judgement paying particular attention to brevity, clarity, and simplicity.

It is so ordered.




E.I. LALTAIKA

JUDGE
27.06.2023

Court

This judgement is delivered today in the presence both the appellant and respondent who have appeared in person, unrepresented.



A handwritten signature in blue ink, appearing to read "E.I. Laltaika", is written over the printed name.

E.I. LALTAIKA
JUDGE
27.06.2023

Court

The right to appeal to the Court of Appeal fully explained.



A handwritten signature in blue ink, appearing to read "E.I. Laltaika", is written over the printed name.

E.I. LALTAIKA
JUDGE
27.06.2023