IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

PC. CIVIL APPEAL NO. 30 OF 2021

DEVOTHA B. MKILIMA ..... APPELLANT

VERSUS

MASUDI IDD RAJABU ..... RESPONDENT

(Appeal from the Judgment and Decree of the District Court of Temeke at Temeke)
(A. S. Rweikaza, RM)
Dated 27th day of October 2022
In
(Civil Appeal No. 25 of 2020)

JUDGMENT

Date: 12/12/2022 & 06/02/2023

NKWABI, J.:

The appellant successfully sued the respondent in the trial Court for T.shs 4,125,000/= over contractual relationship. It is common ground that the appellant supplied the respondent with sacks of charcoal for sale on the agreement that the appellant would be paid by the respondent. The contractual relationship started since the year 2015. The respondent did not pay all the amount due. Thus, he was sued in the trial court.

The decree of the trial court aggrieved the respondent who successfully appealed to the district court which quashed the judgment of the trial court for the reason that the principles of natural justice were violated by the trial

Court. It received documentary evidence without comments from the parties and the respondent was not availed with opportunity to call his witnesses. Unhappy with the decree of the first appellate court the appellant has appealed to this Court.

I having read the grounds of appeal, I think the real grounds of appeal are two:

1. The 1st appellate court erred in law and fact by allowing the appeal on the ground that the trial Court did not give right to be heard to the respondent without ordering a retrial.
2. It was wrongful for the appellate court to have ordered for costs while no party was responsible for the irregularities.

Contending against the 1st ground of appeal, the respondent argued that during the trial, the trial magistrate commanded the respondent to stand as sole witness. He added, the trial magistrate imposed obstacles when the respondent defended his case.

I have carefully gone through the proceedings of the trial court, I find no where the trial magistrate commanded the respondent to stand as sole witness. To the contrary the court had even adjourned the matter when the

respondent claimed that he was not feeling well. He had not appeared with his witness and on the next date for hearing the respondent appeared without a witness and assigned no reasons for failing to bring his witness. I think that the trial magistrate was justified to close the respondent's case. It is just unfortunate that the trial magistrate did not assign reasons for closing the respondent's case but the reasons could be clearly seen on the record. Parties cannot be allowed to bring witnesses as they wish. I am of the view that the trial court had afforded the respondent with an opportunity to call witnesses but the respondent did not care. I think that the trial magistrate was lenient to the respondent else would have asked the respondent to close his case, failure of which would have entitled to the Court to dismiss the respondent's defence. The respondent by appealing to the district court merely jumped from the fraying pan into the fire.

Leave that aside, the respondent actually admitted being indebted to the appellant due to charcoal business. I do not see how those witnesses would come to change the direction of the tide. Further, he did not materially challenge the evidence of the appellant by way of cross-examination. That is contrary to **Rashidi Sarufu v. Republic,** Criminal Appeal No. 467 of 2019:

"As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted the matter and will be estopped from asking the trial court to disbelieve what the witness said."

See also **Emmanuel Lyabonga v Republic,** Criminal Appeal No. 257 of 2019 CAT (unreported):

"Actually, this piece of evidence was supported by the appellant's co-accused who, in cross-examination, said that the appellant had phone communications with a person he did not know. That apart, it is also momentous that the appellant acknowledged the communications in his cautioned statement ..."

On the question of admitting exhibits contrary to the laid procedure, I am of the view that the law is now settled that when that happens, the appellate court will expunge the offensive exhibit and leave the rest of the evidence intact. See **Jafari Musa v DPP,** Criminal Appeal No. 234 of 2019, CAT, (unreported) where it was stated:

"Apart from that, even if the age that was shown in PF3 would have been valid, since the PF3 was not read out after

being cleared for admission, it has to be expunged from the record of appeal. The effect of the expungement of the PF3 is that it makes it redundant and of no evidential value."

One could also have reference to **Magina Kubilu @ John v The Republic,** Criminal Appeal No. 564 of 2016, CAT (unreported):

"However, the foregoing notwithstanding, as rightly submitted by Ms. Tuka, the contents of the PF3 were eloquently covered by the oral testimony of Dr. Luganga Vedasto who prepared it. We agree that the testimony of PW3 sufficiently proved the evidence that would otherwise have been found in PF3.

Having deliberated this appeal as I have indicated above, I am of the firm that the 1st appellate court wrongly allowed the appeal and quashed the judgment of the trial court. I need not discuss the 2nd ground of appeal.

That said and done, I allow the appeal with costs. The judgment of the district court is quashed and its decree and orders are set aside. The decision of the trial court is restored.

It is so ordered.

DATED at **DAR-ES-SALAAM** this 6th day of February 2023

J. F. NKWABI

JUDGE