THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

CIVIL APPEAL NO. 28 OF 2022

(Arising from Civil Appeal No. 31 of 2021 in the District Court of Morogoro originating from Civil Case No. 10 of 2021 in the Primary Court of Kingolwira)

FLORENCE FELICIAN BASIGA ..... APPELLANT

VERSUS

GLORY DAVID..... RESPONDENT

JUDGMENT

Hearing date on: 15/08/2023
Judgment date on: 21/08/2023

NGWEMBE, J.

This is a second appeal, arising from the district court's decision which quashed the judgment and decree of the primary court in the dispute which revolves around a simple claim of debt between normal citizens who were engaged in a transaction of goods supply on credit relying on their mutual trust. The clear background of this dispute is recapped hereunder.

The appellant was dealing with fish wholesale while the respondent was a dealer in retail fish trade. Being acquainted to each other, the appellant kept the custom of selling fish to the respondent regularly. Sometimes the respondent's husband was also engaged in the business. Due to the goodwill, it seems, both parties were in a sort of mutual understanding to the extent that the respondent would take goods on

credit, and usually paid later without difficulty. But in the long run, it happened that the respondent and her husband who used also to take goods on credit in a joint business defaulted. They did not want to pay the debt and even respondent avoided the appellant. When the appellant faced her, she did not have a positive answer. The appellant therefore successfully sued the respondent before Kingolwira Primary Court. An award of Tshs. 2,200,000/= being the debt claimed and Tshs. 65,000/= for costs was awarded.

The respondent was aggrieved, so she appealed to the district court with 7 grounds, which were on both law and fact. The learned appellate magistrate having listed the grounds and reliefs he proceeded to state that he found no need to state the submissions of the advocates. Then stated briefly that, the duty of the first appellate court is to re-evaluate the evidence. He was very clear on the words used that to re-evaluate the evidence is to read the evidence and subject it to critical analysis. He did not make such critical analysis, what is on the judgment is that soon after that he stated that, he had gone through the typed judgment of the trial court and found that the trial magistrate failed to analyse the evidence. He proceeded to quash the trial court's judgment.

Now before this court, the appellant having the services of Mr. Asifiwe Alinanuswe, learned advocate, filed this appeal to challenge the district court's decision on one ground that; the first appellate court erred in law by holding that the trial primary court did not analyse the evidence before it, while the trial court did analyse the evidence before it and hence correctly entered the verdict.

The respondent's whereabout seem to have been untraceable, the appellant successfully prayed for substituted service which was made on 04/07/2023 through Mwananchi Newspaper. Yet the respondent did not

appear on 06/07/2023, likewise on 01/08/2023, then an order was made for the appeal to be heard on 15/08/2023. On that date the appeal was called for hearing, again the respondent did not appear. Upon prayer by the learned advocate, this court ordered hearing to proceed *ex parte*.

Submitting in support of the appeal, Mr. Alinanuswe maintained that, the district court erred in law and fact for failure to appreciate that the trial court properly analysed the evidence. The first appellate court did not disclose how the trial court failed to analyse the evidence, he argued. He cited the case of **Salu Mhando Vs. R [1993] T.L.R 170** stating that, it is permissible for the second appellate court to re-evaluate the evidence when there is misdirection and make its own finding. He invited this court to do the same, confirm the trial court's judgment and quash the first appellate court's judgment.

The main question is whether the district court was correct in its finding when ruled that, the trial court did not analyse the evidence properly. I take note that the appellate magistrate was fully aware of the duty imposed upon him by the law. He even cited the case of **Mapambano Michael @ Mayanga Vs. R, (Criminal Appeal 268 of 2015) [2016] TZCA 310,** where the court emphasized on the duty of the first appellate court to subject the entire evidence on record to a fresh evaluation in order to arrive at its decision. This position was reiterated in another case of **Registered Trustees of Joy In The Harvest Vs. Hamza K. Sungura, Civil Appeal 149 of 2017, CAT at Tabora.**

For a logical flow of reasoning, it is necessary to clarify further on the appellate court's duty. The duty of the first appellate court must be actual re-evaluation, not a mere statement that the court is bound to re-evaluate the trial court's evidence. In the **Registered Trustees of Joy in The Harvest's** case, the Court of Appeal in testing whether the first

appellate court actually re-evaluated the evidence, explained as to what re-evaluation means in practical sense. It stated: -

> *"The obligation imposed on the first appellate court in handling an appeal is not a light duty, it is a painstaking exercise involving rigorously testing of the reliability of the findings of the court below."*

In this case, the first appellate magistrate just referred to the principle that the first appellate court is bound to evaluate the evidence. He did not make any re-evaluation or critical analysis of the evidence. But he just quoted part of the trial court's finding and then proceeded as follows: -

> *"The trial magistrate has failed to analyse the evidence brought before him and to reached the conclusion of tsh 2,000,000/=. Failure to analyze and evaluate evidence is too fatal. This alone made this court to allow the appeal, quash the trial judgment. It is so ordered!"*

In my appreciation of the rule, the first appellate magistrate was never guided by the principle and he did not *walk the talk*. When the court claims to have followed a given principle, it must reflect in the proceeding or judgment. It is not only by stating that a certain principle of law guided the court, but rather being actually guided by such rule in the practical aspect. We ruled so in the case of **Onati Ngulo Kikulilo @ Another Vs. R, (Criminal appeal No. 74 0f 2022) [2023] TZHC 19226** and I will insist the same spirit in this case.

The appellate magistrate who criticized the trial court's judgment pointing that the trial magistrate failed to analyse the evidence, he himself did not try to analyse the said evidence. Mr. Asifiwe was puzzled by the appellate court's unclear method to reach into the finding, that is why he questioned on how did the magistrate get into such finding. I

think Mr. Asifiwe's point here is strong. This is because generally, an appellate court cannot tell whether the lower court failed to analyse the evidence without itself analyzing the said evidences. Here I am of the strong opinion that, the appellate magistrate was not in a position to tell whether or not the trial court properly analysed the evidence before it, at least he ought to be aware that soundness of analysis is tested by another analysis. Regarding analysis of the evidence in the appellate court, it was a man's attempt to remove the speck of sawdust in his brother's eye before paying attention to the plank in his own eye.

However, it is known that when the first appellate court failed to analyse the evidence, the second appellate court can work on that. The learned advocate reminded this court about this clear position of the law, and in my understanding, he was correct that this court can reevaluate the evidence before the trial court and come up with a clear finding. In the case of **Sokoine Chelea Vs. R [2008] T.L.R. 345 [CA],** the Court of Appeal exemplified this duty. It decided in itself to re-evaluate the evidence and made its finding, but before going into re-evaluation it observed thus: -

> *"It is also apparent from the judgment that there was failure by the learned judge to reevaluate the evidence and make independent findings on the case. The appellant was entitled as of right to have the evidence of the trial court reevaluated by the first appeal court and an independent finding made. This was not done and as we will show later in this judgment, justice was not done."*

This court will therefore re-evaluate the evidence to make its finding as to whether the trial court's finding was grounded on the evidence available or otherwise.

The first and second witness of the plaintiff's side, coherently stated that, the appellant was engaged in business since 2018 with the respondent who was together with her husband. The respondent and her husband were retail fish venders, while the appellant sold wholesale. That due to their established relationship, the respondent used to secure goods by credit and paid later in instalment. But it happened that having incurred debts, being Tshs. 1,085,000/= earlier unpaid debt on the appellant's husband and Tshs. 1,116,380/= which remained after part payment out of Tshs. 3,600,000/= debt, the respondent was indebted to the tune of Tshs. 2,200,000/= which she failed to pay. Though the second witness Jovitus Ananius stated that the actual debt was Tshs. 2,543,000/= and he described the figures.

The respondent in her defence admitted to have been involved in such a business with the appellant and that they were taking the goods on credit, but she was not sure of the exact figure on debt. That she did not agree to the figures disclosed by the appellant and his young brother. But upon discussing with her husband, they resolved that they should pay the debt. An arrangement was made for the respondent to pay the debt at Tsh. 10,000/= daily instalment. She accepted the debt of Tshs. 1,180,000/= due on herself, and she said she is ready to pay that one. The second defence witness just affirmed that the respondent used to secure goods from the appellant on credit and one day the parties met to verify the debt, which was found to be around Tshs. 3,900,000 but was not sure of the exact figure. Also, that they agreed payment by instalment, but some days later the respondent defaulted. When the appellant faced the respondent, the latter did not have any good response that is why the appellant went to court.

From the evidence, the following are not in dispute; That the parties were in business relations and the appellant used to supply the

goods to the respondent and her husband on credit; That there was no regular formula in payment therefore the respondent and her husband used to pay the debt by instalment; Both, the respondent and her husband agreed the debt and arranged a fixed formula for repayment; That in the new arrangement the respondent with her husband defaulted after several payments.

I understand that although the appellant stated to have had a book in which the transactions were being recorded, they did not tender the record in court. The respondent as well, never tendered any document to dispute the figures. Regarding the figures, this court finds that the evidence of the first witness was much authoritative as accepting the second witness (PW2) would make the evidence exceed the whole claim disclosed by the claimant. Also considering that they agreed on the figures, it would not be the business of the court to disbelieve the plaintiff only on the ground of difference in minor points of figures. As to whether part of the debt incurred by the respondent's husband was to be included on her responsibility or not, the court has extracted from the trial court proceeding and found the appellant herself put it clear in cross examination and during questioning by assessors as follows: -

> *"Mwaka 2018 biashara ulianza na mimi hapa sio mume wangu... Mizigo yote hesabu ilikuwa inawekwa kwangu...Deni la nyuma nilikubaliana nalo, ulifanya biashara na mume wangu kupitia mimi"*

In the above, the respondent was telling the court that the appellant conducted business with the respondent herself and that even when the respondent's husband was involved, the debt was kept in her account or so to say joint account. That, she admits the previous debts and the husband was securing the goods through the respondent. This

one is supported by DW2, one Uwezo Rashidi, who in questioning by the wise assessor stated that the respondent's husband did not appear to testify on the defence side because he was never connected to the appellant but was just receiving goods through the respondent.

In this court's opinion, the respondent's claim was proved to the required standard. The reasoning by the trial court in my opinion was sound and supported by the available evidence. Part of the reasoned finding is reproduced hereunder; -

> *"Kwa sababu mdai amethibitisha alifanya biashara ya kumpa samaki mdaiwa na mme wake kwa awamu awamu, awamu ya kwanza mdaiwa akiwa na mme wake walitengeneza deni la Tshs 1,085,000/=...baada ya mme wake kusafiri mdaiwa alikuwa anaendelea na biashara ya kuchukua samaki kwa mali kauli hadi kupelekea naye kutengeneza deni la Tshs. 3,600,000/= ambapo alilipa na kubakiza Tshs. 1,116,380/=. Ushahidi huu umeungwa mkono na ushahidi wa shahidi wa kwanza wa mdai"*

The learned trial magistrate reasoned that the claim was proved by evidence adduced by the appellant and corroborated by his witness. I understand the burden of proof is on the plaintiff under rule 1 (2) and the standard is on balance of probability as per rule 6 in the Schedule to **The Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations.** Having considered the grounds of appeal before the district court, which again were not addressed, I wish to remind parties and the first appellate court that, the nature of this business was not on much technical procedures. Given the fact that parties were not expected to keep the record and all correspondences in a professional way, their case was to be dealt with in the same way. This reminds me

of the decision in the case of **Fadhili Vs. Lengipengi [1971] H.C.D 31** that: -

> *"In African custom business is transacted without documents. Writing as such is an innovation which is only familiar to the sophisticated young who have had opportunity to receive coaching in the ways of the Whiteman."*

Though **Fadhili**'s case was decided more than 50 years back, very little has changed so far as to the literacy of the community. Level of civilization is still diverse. It is not expected that each person will be able to conduct his business in a formal and documented way. Negligible weaknesses in the undertaking are usually fit for leniency.

In the analysis made by this court, I am satisfied that the verdict reached by the trial court was sound and justified as earlier shown. To its contrary, the finding made by the appellate magistrate was irregular and unfounded. No analysis was ever conducted by the appellate magistrate in reaching his finding.

The above finding would have sufficed to pen off, but there is a call to address on the nature of the judgment which the appellate magistrate drafted and pronounced. There is a serious need to address on how judgments are drafted. But to start with, what is a judgment? **The Black's Law Dictionary, 9th edition** gives the following interpretation: -

> *"Judgment - A court's final determination of the rights and obligations of the parties in a case. The term judgment includes an equitable decree and any order from which an appeal lies."*

That one is parallel to what our laws provides. Section 3 of **the Civil Procedure Code [Cap 33 RE 2019]** (the CPC) provides that: -

""judgment" means the statement given by a judge or a magistrate of the grounds for a decree or order"

This section 3 was as well applied in the case of **Tanga Cement Co. Ltd Vs. Christopherson Co. Ltd [2005] T.L.R. 190** by the Court of Appeal. The statement of a court, judge or magistrate is a special statement. It does not look like a mere statement, that is why it must possess special qualifications. Those qualifications are what in our statutes called contents of judgment. This is provided in **The Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules, G.N. No. 312 of 1964** among other statutes. Rule 16 provides for the contents of judgment in the following words: -

"The judgement of the appellate court shall be in writing, and shall state –

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision;

(d) N.A"

The above is *pari materia* to the **Civil Procedure Code**, which though does not apply directly to appeals originating from primary courts, but this reference may add an easy reference to the appellate magistrate. This is Order XX Rule 4 of the CPC on contents of judgment. Same provides: -

"A judgment shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision."

Not only the above, but even section 312 (1) of **the Criminal Procedure Act, Cap 20 RE 2022** together with **The Judicature and Application of Laws (Criminal Appeals and Revisions in Proceedings Originating from Primary Courts) Rules, 2021 rule**

22 (1) which is similar to Rule 16 of **G.N. No. 312 of 1964,** provides on the main contents of judgment.

Likewise, about what must be included in the judgment was well stated by the Court of Appeal in the case of **Hamisi Rajabu Dibagula Vs. R [2004] T.L.R 181.** The court having referred to section 312 of the CPA, referred also the case of **Lutter Symphorian Nelson Vs. The Attorney General and 2 others [2000] T.L.R 419 [CA]** among the useful precedents where it was stated that: -

> *"A judgment must convey some indication that the judge or magistrate has applied his mind to the evidence on the record. Though it may be reduced to a minimum, it must show that no material portion of the evidence laid before the court has been ignored."*

Another valuable precedent on qualification of a good judgment is that of **Amirali Ismail Vs. Regina 1 T.L.R. 370** where it was held further as hereunder: -

> *"A good judgment is clear, systematic and straightforward. Every judgment should state the facts of the case, establishing each fact by reference to the particular evidence by which it is supported; and it should give sufficiently and plainly the reasons which justify the finding. It should state sufficient particulars to enable a Court of Appeal to know what facts are found and how."*

A substantive determination made herein would suffice to conclude the matter as earlier pointed. But I have travelled this much further in order to shade more light to the magistrates that, they should know and always remember how they can make their valued work to count.

The judgment which the appellate magistrate purported to draft had the points for determination and a vague decision, which was not

clear if at all he considered the grounds of appeal. No reasons for decision were given. Even the findings were erroneous as he did not reevaluate the evidence, but yet he came to the finding that, the trial magistrate failed to analyse the evidence before him. No analysis was made by the appellate magistrate through which he would justify his criticism on the trial magistrate's findings. As I have demonstrated, the judgment suffered from serious deficiency in both form and substance.

The above reasoning is given while aware that there is no universal style of judgment writing, only the minimum standards must be met. See the case of **Issa Juma Magono Vs. Athwal's Transport & Timber Ltd Civil Appeal No. 22 of 2018** where it was held: -

> *"Generally speaking, judgment writing is an art and it differs from one judge/magistrate to another, there is no hard and fast rule on how judgments should be written but the law gives the guidelines about the content of a judgment, I will be wrong to challenge the skills of other judge or magistrate just because her writing skill is different from mine."*

Also, the Court of Appeal in **Chandrakant Joshubhai Patel Vs. R, [2004] T.L.R 218,** when dealing with application for revision, made a useful highlight on the contents of judgment that: -

> *"No judgment can attain perfection but the most that Courts aspire to is substantial justice. There will be errors of sorts here and there, inadequacies of this or that kind, and generally no judgment can be beyond criticism."*

But where any of the main contents is missing from the judgment, then there is no judgment properly called. It is for convenience purpose that this court did not order the judgment be composed, due to its nature, this dispute required to be addressed on substance as done.

Having so reasoned, this court finds merit in this appeal, proceeds to allow the same. It is on the reasons above I procced to quash the judgment and decree of the appellate magistrate and restore the judgment entered by the trial court together with all orders therein.

Order accordingly.

Dated at Morogoro this 21st August, 2023.

P. J. NGWEMBE

JUDGE

21/08/2023

Court: Judgement delivered at Morogoro in chambers on this 21st August 2023 in the presence of Mr. Asifiwe Alinanuswe, learned Advocate for the appellant and in absence of the Respondent.

A.W. Mmbando

DEPUTY REGISTRAR

21/08/2023

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

A.W. Mmbando

DEPUTY REGISTRAR

21/08/2023