**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**(MBEYA SUB-REGISTRY)**

**AT MBEYA**

**PC. CIVIL APPEAL NO. 02 OF 2023**

*(Arising from Civil Appeal No. 01 of 2022 in the District Court of Songwe at Mkwajuni, originating from Civil Case No. 67 of 2022 in the Primary Court of Songwe District at Mwambani)*

**ZAKAYO SHADRACK MATIGA ..... ..... APPELLANT**

**VERSUS**

**EPHRAIM EDWARD NGOLE ..... RESPONDENT**

# JUDGMENT

*Date of Last Order: 20/07/2023*
*Date of Judgment: 29/09 2023*

**NDUNGURU, J.**

This is a second appeal against the judgment and decree of the District Court of Songwe at Mkwajuni in Civil Appeal No. 01 of 2022 delivered on 23/12/2022. The appeal originates from a complaint by the respondent (the then applicant) against the appellant (the then respondent) before the Primary Court of Songwe District at Mwambani in Civil Case No. 67 of 2022 seeking to be granted a share of TZS. 20,000,000/- for the sale of gold minerals, the return of

tricycle and stone crusher, and the costs of the suit. The primary court ruled in favour of the respondent but the costs of the case was not granted. Discontented with the said decision, the appellant unsuccessfully appealed to the District Court of Songwe in Civil Appeal No. 01 of 2022 and dissatisfied, hence the instant appeal.

The appellant approached this court armed with a total six (6) grounds of appeal to challenge the said decision as follows;

1. *That, the learned Senior Resident Magistrate erred in law and fact when he upheld the decision of the trial court that there was a contract between the appellant and respondent for gold mining at sixforteen area while the appellant and respondent have never mined gold at the said sixforteen area, due to the fact that the same were mining at Mbagala area where he used to pay the respondent as a causal worker Tshs. 30,000/- per day.*

2. *That, the learned Senior Resident Magistrate further erred in law and fact when he held that on 25/10/2020 the appellant testified at the trial court that he commenced preparing a stone*

*crusher by using the respondent as a close partner while the same told the trial court that on 25/10/2020 he started preparing a stone crusher by using the respondent as his a close friend and not as a close partner and the said preparation was for gold mining at the area of Mbagala and not at the area of sixforteen.*

3. *That, the learned Senior Resident Magistrate further erred in law and fact when he held that the appellant breached a contract in respect of gold mining at the sixforteen area while the same had never engaged in gold mining at the said area.*

4. *That, the learned Senior Resident Magistrate further erred in law and fact when he held that Exhibit 3 admitted by the trial court that is TRA invoice is clear evidence that the respondent was not a causal while the said invoice was in respect of his own business of selling gold, but also it is not for gold mining at sixforteen area the place where the same alleged that he and the appellant own.*

5. *That, the learned Senior Resident Magistrate further erred in law and fact when he upheld the decision of the trial court that the appellant to pay the respondent a sum of Tshs. 20,000,000/- purported to be his share of alleged gold obtained by relying on assumptions and speculations that a huge amount of gold obtained estimated to be 850 grams while there is no any evidence to show that any amount of gold obtained.*

6. *That, the learned Senior Resident Magistrate further erred in law and fact when he failed to observe that the trial court was wrong when it refused to accord the appellant with an opportunity to call his witness who could testify as to the ownership of the stone crusher.*

On the hearing date the appellant appeared represented by Mr. Medard Mutongore, learned counsel of Human Rights and Legal Clinic Organization whereas the respondent appeared in person unrepresented and both parties were allowed to dispose this appeal by way of written submissions upon scheduling court order.

In amplifying the grounds of appeal at hand Mr. Mutongore contended in the 1st ground that, the respondent claim was based on the production of the gold mineral at the Saza area but the trial court record reveals that the said contract was entered between the parties in respect of gold mining activities undertaken at Sixforteen area which is a contradictory records of the trial court. To buttress his position, he cited the case of **Paulo Ng'wandu Lucas vs. Thomas Jeja**, Land Appeal No. 88 of 2016 HCT at Shinyanga (unreported) the court observed that;

> *"I am guided by the principal that this being the first appellate court, it has an obligation to reconsider and evaluation the evidence on record and come to its own conclusion bearing in mind that it had no opportunity to see the witnesses testifying.* ***Audifance Kibala vs. Adili Elipenda and others****, Civil Appeal No. 107 of 2012 (unreported)."*

The above position requires the appellate court to re-consider and conduct evaluation of the trial court records and come up with

the decision of appeal to justify with regards to the trial court records. It is not in dispute that the trial court records portray that the respondent's claims based on work purported to be done at Saza and not Sixforteen area. It was an error of the first appellate court to hold that it is immaterial whether the agreement was undertaken Sixforteen or Saza as indicated at page 8 of the judgment. This is against the evidence of SM1 narrated before the trial court as appeared in the record. According to section 29 of the **Law of Contract Act**, Cap. 345 R. E. 2019 provide that, an agreement the meaning of which is not certain or capable of being made certain is void.

In the case of **Alfi E. A. Limited vs. Themi Industries and Distributors Agency Limited** [1984] TLR 256 and **Nitin Coffee Estates Limited and Others vs. United Engineering Works Limited and Another** [1988] TLR 203 it was observed that, it is undisputed fact that there is uncertainty as to the place where the purported contract for mining activities was executed. The appellate court ought not to have ruled out that the appellant entered into a

contract with the respondent for gold mining at Sixforteen area which is contrary to the evidence on record as already shown above.

The respondent failed to prove exactly which area the purported gold mining was undertaken. The respondent neither worked for the appellant at Saza nor Sixforteen area as he was a casual labourer managing business of the appellant at Mbagala area where he has used to be paid Tshs. 30,000/- per day, the fact which was never denied by the respondent.

In the second ground of appeal Mr. Mutongore contended that, on 25/10/2020 the appellant testified at the trial court that he commenced preparing a stone crusher by using the respondent as a closer partner. On the other hand, he told the trial court that on same date he started preparing a stone crusher of the respondent as his close friend and not a partner at Mbagala area and not at Sixforteen or Saza area. When the appellant was using the stone crusher of the respondent for preparation of gold mining at Mbagala did not mean that the same was his co-partner in his business of gold mining at Mbagala area.

In the third ground of appeal Mr. Mutongore contended that, the evidence of the respondent at the trial court is clear that there was no contract between the appellant and the respondent in respect of gold mining activities at Sixforteen area which belong to Peter Charles. For breach of contract to stand, the parties must have agreed on fundamental terms of the contract. To buttress his position, he cited the case of **Tanzania Fisha Processs Limited vs. Christopher Luhanyula**, Civil Appeal No. 21 of 2010 (unreported) the court observed that;

> *"...there is no contract if there is no consensus ad idem or put in other words, there can only be a valid contract, where there has been meeting of the minds of the parties involved."*

There is no evidence in the trial court record which indicate that the parties had ever entered into partnership deed for gold mining at Saza area or Sixforteen area. It was an error of the first appellate court to hold that the appellant breached a contract in respect of gold mining at the area of Sixforteen while the respondent himself

never testified at the trial court that his claim arised from the gold processed at Sixforteeen area.

In the fourth ground of appeal Mr. Mutongore contended that, the TRA invoice was indeed for the respondent's own business of selling gold that is the reason of the TRA to claim tax from him and not from parties as a partners. The first appellate court committed an error to hold that tax invoice as exhibit S3 and blue card as exhibit S2 were received by the trial court while in the proceedings of the trial court does not state the said exhibits were received at the trial.

In the fifth ground of appeal Mr. Mutongore contended that, it was an error to hold that the appellant to pay the respondent TZS. 20,000,000/- as a share for the sold gold. This were the speculation that a huge amount of sand contained estimated 850 grams of gold while there is no any evidence to show that there was such gold obtained from the purported sand. Moreover, the trial court record nowhere mentioned the quantity of sand that produced the said estimated gram of gold.

According to Rule 7 of the **Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations**, G.N. No. 66 of 1972 provide that, in deciding all cases the court must confine itself to the facts which are proven in the case and the matters it is deemed to know or may presume under rule 3 and 4. A court must not take into account any fact relating to the case which it hears of out of court except facts learnt in the presence of the parties during a proper visit to any land or property concerned in the case.

Also, rule 1(2) of the **Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations**, G.N. No. 66 of 1972 provide that, where a person makes a claim against another in a civil case, the claimant must prove all the facts necessary to establish the claim unless other party (that is the defendant) admits the claim. According to the position cited above, it is undisputed inference that the respondent ought to have proved all the facts necessary to establish that the gold estimated to be 850 grams was obtained. This was supposed to be by way of tendering documents from the mining authority which shows that the said grams of gold were obtained after being weighed, but the same was not so established.

In the sixth ground of appeal Mr. Mutongore contended that, it was an error to hold that the trial court was correct when it refused to accord the appellant with an opportunity to call his witness to testify as the ownership of the stone crusher. According to rule 16(2) of the **Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations**, G.N. No. 66 of 1972 provide that, any person who may be a witness in a case may be summoned and required to give evidence in that case. It was wrong to close a defence case while the appellant was supposed to bring a witness in order to testify about ownership of the stone crusher. He prays the court to allow this appeal with costs.

In his reply to the grounds of appeal Mr. Ephraim E. Ngole submitted that, they entered into an oral contractual business against the appellant on 23/04/2022. They agreed that the appellant shall facilitate the business work by giving money of buying fuel for stone grinding machine. His duty was to support by instruments for gold mining activities in different areas including the said Sixforteen area and Saza. They worked almost for 4 months and 24 days until 27th August, 2022 and their contract was to be limited after four working

months. The appellant breached the said contract by failure to perform his duty.

Also contended that, the appellant failed to surrender his instruments and the gold mined contrary to the terms of their contract that they need to collect gold minerals for purpose of division equally shares. In calculation the gold mineral was mined he was entitled TZS. 35,000,000/- as his share from the collected 850 grams valued TZS. 90,000,000/-. The appellant did not dispute to work with him under the oral contract. Their activities were undertaken in mining areas at Saza and Sixforteen.

Further he contended that, the records of the trial court are clear with respect to their agreement entered with the appellant instead of blaming on specific area of work he could specify and extract from the proper land. Also, there is no record shown that the appellant was refused by the trial magistrate to call his witness or the appellant never made any prayer before the trial court to call his witness. So, it is an afterthought to lament and should be ignored by

this court. He beseeched this court to dismiss this appeal with costs as being meritless.

In rejoinder Mr. Mutongore maintained all he has submitted in-chief to support this appeal. The appellant neither entered into partnership with the respondent to conduct mining activities at Saza area nor Sixforteen area. Thus, it was not proper to state that the appellant breached the said partnership agreement. It is nowhere in the trial court records that there was partnership name which was used to carry out their partnership business. According to section 190(2) of the **Law of Contract Act**, [Cap 345 R.E. 2019] which provide that, persons who have entered into partnership with another are called collectively a "firm" and the name under which their business is carried on is called the "firm name".

According to the trial court proceedings clearly show that the defence was to continue on 02/11/2022 but the same could not proceed as the appellant has sent a person to inform the court of his absence. The trial court never recorded the reason for the prayer of adjournment and then, it refused to adjourn a case without assigning

a reason. The trial court record is clear that the appellant defence was treated unfairly. The trial court refused to record the invoice of the tricycle without assign any reason of denial to receive it. The appellant had the evidence of the person one Raphael Godwin who purchased the said tricycle. He maintained that this court to allow the appeal with costs.

Upon considering the entire record and the parties' rival arguments contained in their written submissions. This court find that it is important in determination of this appeal to start with the 6th ground of appeal because, it is centered on a right to be heard whereby the appellant argued that he was not fairly heard while the respondent refuted the contention.

The gist of the complaint by the appellant in the 6 ground hinge on the action by the trial court to close the defence case after the failure by appellant to attend to court so as to proceed with the hearing of the defence case, on the date and time scheduled for hearing by the trial court. Although he sent a person to the trial court to seek adjournment after he has got an emergency. For easy

of reference of the arguments to follow, I found it appropriate to reproduce the relevant part that gave rise to this complaint found at pages 16-18 of the trial court proceedings of the record of appeal:-

> *"**Amri:** Shauri litakuja kwa ajili ya usikilizwaji tarehe 02/11/2022.*
>
> *Imesainiwa na I. V. Mnyigumba,*
> ***Hakimu Mkazi.***
> ***01/11/2022.***
>
> ***Tarehe:** 02/11/2022*
>
> ***Mbele ya:** I. V. Mnyigumba, Hakimu Mkazi*
>
> ***Mdai:** Yupo - (Wakili Jenifer Joel Silomba kwa niaba ya Mdai)*
>
> ***Mdaiwa:** Hayupo – kwa taarifa na mtoa taarifa ameondoka mahakamani.*
>
> ***Mdai:** Sidhani kama taarifa yake inamashiko na kama anaweza atoe gharama za malazi ili kesi iahirishwe. Ni hayo tu. I.K.S*
>
> *Imesainiwa na*
> ***Mdai.***
>
> ***Mahakama:** Sababu iliyotolewa na mdaiwa kuwa anahudhuru kimsingi haina mashiko na kwa kuwa tarehe 01/11/2022 wakati akitoa utetezi wake aliomba tarehe ya leo (02/22/2022) majira ya saa tatu na nusu kuwa*

*atakuwa amefika mahakamani, lakini mpaka sasa saa tisa jioni hajafika mahakamani, na kwa kuzingatia amekwishatoa ushahidi wake, hivyo shauri hili litakuja kwa ajili ya hukumu tarehe 07/11/2022.*

*Imesainiwa na I. V. Mnyigumba,*
***Hakimu Mkazi.***
***02/11/2022.***

***Tarehe:*** *07/11/2022*

***Mbele ya:*** *I. V. Mnyigumba, Hakimu Mkazi*

***Mdai:*** *Yupo.*

***Mdaiwa:*** *Hayupo.*

***Mahakama:*** *Shauri limekuja kwa ajili ya hukumu leo hii tarehe* ***07/11/2022****.*

*Imesainiwa na I. V. Mnyigumba,*
***Hakimu Mkazi.***
***07/11/2022.***

***Mahakama:*** *Uamuzi huu umesomwa leo tarehe* ***07/11/2022*** *katika mahakama ya wazi mbele ya mdai na pasipo uwepo wa mdaiwa.*

*Imesainiwa na I. V. Mnyigumba,*
***Hakimu Mkazi.***
***07/11/2022.***

***Rufaa:*** *Haki ya rufaa ipo wazi ndani ya siku 30 kutokea leo hii ambapo mdai na mdaiwa wote wanapatiwa nakala za Hukumu.*

*Imesainiwa na I. V. Mnyigumba,*
***Hakimu Mkazi.***
***07/11/2022."***

It is plain from the above snippet of information that on 01/11/2022, the trial court scheduled the hearing to continue on 02/11/2022. The snippet further shows that on the date and time scheduled, the appellant was absent in court although he sent another person to pray for adjournment of the hearing. It also shows that the trial court received the information about the appellant's absence but the trial court refused to adjourn the matter. It is worth to note that the trial court comment on the information received that the appellant's absence is nonsense. Later on a reflection, the matter was scheduled for the delivery of the judgment.

It is the contention of appellant, and rightly so in my observation that the trial court's action was, with respect arbitrary. Also, the first appellate court did not cure the mischief of the trial court to close the defence case without justification. In my view,

that was a clear indication of violation of a right to a fair hearing guaranteed under Article 13 (6) (a) (ii) of the Constitution. I say so for the following reasons; **one;** the appellant, though sent a person for the purpose of praying adjournment in accordance with rule 51 of the **Primary Courts Civil Procedure Rules**, G.N. No. 310 of 1964, was not granted the right to adjournment before the last order to close the defence case was made.

The Court of Appeal of Tanzania in **David Mushi vs. Abdallah Msham Kitwanga,** Civil Appeal No. 286 of 2016 approved the decision of the case of **Abdallah Kondo vs. Republic,** Criminal Appeal No. 322 of 2015 (unreported) it was observed that, a trial magistrate or judge has no power to close neither the prosecution nor defence case. It was further observed therein that the parties are at liberty to close their respective cases after being satisfied that what their witnesses have adduced as evidence is sufficient. I am of the view that, the underlying principle is also applicable in the case at hand.

**Two;** the appellant's right to call witnesses was contravened as the trial court did not consider the reason for the absence of the appellant. In fact, the trial court did not assign any reason for the rejection of adjournment for case hearing. **Three,** though the trial court under rule 51 of the **Primary Courts Civil Procedure Rules**, G.N. No. 310 of 1964 has discretionary powers to grant adjournment where it is of the view that sufficient reason is given, the reason advanced behind the absence of the appellant was in my view, sufficient to warrant the adjournment which was prayed by appellant's representative. As such, the discretionary powers vested on the trial court was not exercised judiciously, from the stronger, when there was no reason for the rejection of the prayer to adjourn the hearing.

In this regard, I agree with appellant's contention that the appellant's right to a fair trial was contravened. The right to a fair trial is a fundamental right enshrined under Article 13 (6) (a) of the Constitution. The said Article states as follows:

*"13 (6) (a) when the rights and duties of any person are being determined by the Court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the Court or of the other agency concerned."*

See also the cases of **David Mushi vs. Abdallah Msham Kitwanga**, Civil Appeal No. 286 of 2016; **Samwel Gitau Saitoti @ Saimoo @ Jose and 2 Others vs. The Director of Public Prosecutions,** Criminal Application No. 73/02/2020; **Ausdirili Tanzania Ltd vs Mussa Joseph Kumili and Another,** Civil Appeal No. 78 of 2014 (both unreported); and **Mbeya-Rukwa Autoparts and Transport Ltd vs. Jestina George Mwakyoma** [2003] T.L.R. 252.

The respondent's learned counsel arguments justifying the closure of the appellant's case by the trial court seem to hinge on two limbs; in the first limb through the written submission by the learned counsel for the respondent argued that the trial court in record had not refused the appellant to call upon witnesses. As for

the second limb which can be picked from the written submission, the respondent's learned counsel contended that, the appellant had not made any prayer before the trial court to bring witnesses. However, the record of trial court reflected at pages 16 as above quoted shows that trial court adjourned the matter and scheduled to continue with hearing on 02/11/2022. It further shows that the appellant was absent but there was a prayer for adjournment. Consequently, both limbs of the respondent's learned counsel arguments are without merit I dismiss them. I join hands with the appellant that he was denied right to a fair hearing in the said circumstances.

It is settled in cardinal principle of law that where a judicial decision is reached in violation of the right to a fair hearing as is the case in this matter, such decision is rendered a nullity and cannot be left to stand. The Court of Appeal of Tanzania in its plethora decisions has consistently taken that stance in various decisions including, **David Mushi vs. Abdallah Msham Kitwanga,** Civil Appeal No. 286 of 2016; **Abbas Sherally and Another vs. Abdul S.H.M. Fazalboy,** Civil Application No. 33 of 2002; **Director of**

**Public Prosecutions vs. Yassin hassan @ Mrope**, Criminal Appeal No. 202 of 2019; and **Margwe Erro and Two Other vs. Moshi Bahalulu**, Civil Appeal No. 11 of 2014 (all unreported). In **David Mushi** (Supra) approved the decision of the case of **Abbas Sherally and Another** (Supra) the CAT observed as follows:-

> *"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."*

[See also **National Housing Corporation vs. Tanzania Shoe Company Limited and Others** [1995] TLR 251.

Based on what I have endeavoured to discuss, I find merit in the 6th grounds of appeal. Since the ground is sufficient to dispose of this appeal, I see no need to continue discussing the remaining

grounds of appeal. I therefore, proceed to quash and set aside the order closing the defence's case (now appellant), proceedings of the trial court from 2th November, 2022 to the end and set aside the trial court judgment and judgment of the first appellate court emanating therefrom. I further order the case file to be remitted to the Primary Court of Songwe District at Mwambani for an expedited hearing to proceed from the stage reached prior to 2th November, 2022.

In conclusion, the appeal is allowed on the ground discussed above. Considering the nature of the infraction in the proceedings, I order each party to bear its own costs.

It is so ordered.


**D. B. NGUNGURU**
**JUDGE**
**29/09/2023**