

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE SUB - REGISTRY OF SHINYANGA**

**AT SHINYANGA**

**CIVIL APPEAL NO. 35 OF 2021**

**1. AMANI JONAS NYABUZOKA**

**2. FLORENTINA GOMBO**

**3. DAUDI J. BALALI**

**4. JAMES JAPHET BALILI (*administrator of  
Estate of the late TATU KHALPHANI*)**

**APPELLANTS**

**VERSUS**

**JAMBO FOOD PRODUCT CO. LIMITED.....RESPONDENT**

**[Appeal from the decision of the District Court of Shinyanga at  
Shinyanga.]**

**(Hon. U.S. Swallo PRM.)**

**dated the 1<sup>st</sup> day of July, 2021**

**in**

**Civil Case No. 17 of 2018**

**JUDGMENT**

*4<sup>th</sup> July & 22<sup>th</sup> September, 2023.*

**S.M. KULITA, J.**

This is an appeal from the District Court of Shinyanga. The story behind this appeal in a nut shell is that, the respondent herein instituted a civil case at Shinyanga District Court, claiming against the appellants jointly and severally, for payment of Tshs. 47,065,160/= being the value of the Cartons of water and soda which the first appellant was entrusted by the respondent as its employee, to sell and deposit the money into the respondent's Bank Account and submit the bank pay-in-slip to the respondent. It is alleged that the 1<sup>st</sup> Appellant was supplied with the products but the said sum of money were not deposited into the Respondent's account.

In a fate to prove the claim at the trial court, the respondent paraded four witnesses. According to the record, PW1 who is the Respondent's Security Officer testified to have witnessed goods being loaded in the trucks and the signing of the get passes for the consignments ordered by the 1<sup>st</sup> appellant to get out of the compass of the respondent's company for selling. PW2 and PW3 as the respondent's Drivers testified to have traveled with the 1<sup>st</sup> appellant heading to Mbeya with the goods. The same witnesses added that, the 1<sup>st</sup> appellant was selling the said goods while on the way to Mbeya. They further asserted that, in carrying the 1<sup>st</sup> appellant's requested goods, they also signed delivery note and invoice. Together with those witnesses, PW4 showed

that, the 1<sup>st</sup> appellant was their employee as an agent and that he was entrusted with goods to sell and deposit the proceeds in the respondent's Bank Account. The same showed that, the 1<sup>st</sup> appellant managed to deposit some amount about 25 million shillings, thus they still owe him the remaining balance amounting 47 million shillings. As the said 1<sup>st</sup> Respondent had the guarantors, they were joined in the company's claim for settling the said sum of money.

In his defense the 1<sup>st</sup> appellant agreed to have been working with the respondent as his agent for selling its products and deposit its proceeds thereby. He agreed to have been taking deferent consignments from the respondent. All in all, the 1<sup>st</sup> appellant disagreed to have taken any consignment without returning its proceeds till when he left the job.

The case was heard and in the final analysis, the trial court entered judgment on favor of the respondent herein. The decision aggrieved the appellants hence this appeal with six grounds as follows; **One**, the trial court lacked jurisdiction to entertain the case, **two**, trial Magistrate made reliance to the document's which were not genuine, **three**, the evidence by the appellants were not considered during trial, **four**, there are contradictions between the respondent's evidence and the pleadings, **five**, the trial court wrongly considered that the 1<sup>st</sup> appellant signed

delivery note and invoice and **six**, the respondent's evidence was in contradiction on the issue of the amount claimed.

On 5<sup>th</sup> May, 2022 the matter was scheduled for hearing through written submissions. Both parties complied with. Mr. Shaban Mvungi, Advocate, represented the appellants whereas Mr. Daudi Mwang'onda, Legal Officer of the respondent, represented the respondent.

Submitting in support of the first ground of appeal which bases on the issue of jurisdiction, Mr. Mvungi stated that, at the trial court the respondent's plaint had no specific or substantive damages. To him this is what determines jurisdiction of the court. He thus concluded that, Lack of it makes the trial court to have no jurisdiction to entertain the case.

On the same line Mr. Mvungi argued that, at the trial court the case was assigned at speed truck one which expired without extension. As such he submitted that, that defect renders the whole proceedings recorded after the expiry of speed truck a nullity.

Concerning the second and fifth grounds of appeal Mr. Mvungi submitted that the genuineness of the invoice, delivery note and employment contract were doubtful, hence objected their admission during trial. However, the trial court wrongly disregarded the objections. The Counsel also wondered as to why the trial court delivered its

judgment without making reliance to the report from the forensic investigation bureau.

Again, he added that, the respondent's witness admitted that the invoice and delivery note were signed with different ink pens. To him this showed that the said documents were not genuine. Further submitting on the invoice and delivery note Mr. Mvungi was of views that, the same were issued in the absence of the 1<sup>st</sup> appellant. To him this is contrary to the contract that the 1<sup>st</sup> appellant had entered with the respondent and that the same were signed on different dates. The counsel made reference to the testimony of PW3.

Mr. Mvungi also faulted the trial court to admit the employment contract between the 1<sup>st</sup> Appellant and the Respondent saying that the same was not signed by the respondent (employer). To him, this is a defect that amounts to no contract at all between parties.

Concerning the third and fourth grounds of appeal Mr. Mvungi submitted that, the respondent's plaint violated Order VII, Rule 1 of the Civil Procedure Code on its content. He maintained that, the trial court did not consider the evidence of the appellants and that it did not deal with the contradictions on the respondent's pleadings and evidence.

On the last ground of appeal Mr. Mvungi was of views that, there is contradiction on the amount of money claimed by the respondent at the trial court. He said that the figures mentioned by the respondent's witnesses do not match with that mentioned in the plaint. He also faulted the trial court for making reliance to the ledger book (exhibit P5) for the reason that the same was not objected during its admission. He said that, the appellants failed to object the same due to the fact that they are not the makers of it.

In reply thereto Mr. Daudi Mwang'onda admitted that, it is substantive claim that determines pecuniary jurisdiction of the case. He said that, the Tshs. 47,000,000/= claimed by the respondent was also a substantive claim. He urged this court to make reference to paragraph 4 of the plaint and the testimony of PW4.

Concerning the reliability to the Order VII, Rule 1 of the Civil Procedure Code which deals with the contents of plaint, Mr. Daudi Mwang'onda stated that, the same was adhered to. He invited the court to verify it by looking at paragraphs 4 and 9 of the plaint.

On the issue of expiry of the speed truck Mr. Daudi stated that, the Judges in the recent case of the Court of Appeal, delivered in 2019 namely **National Microfinance Bank PLC vs. Mary Rwabizi Trading T/A**

**Amuga Enterprises, Civil Appeal No. 296 of 2017 CAT at DSM** had the views that, the proceedings recorded after expiry of the speed truck is not a nullity.

Concerning the 2<sup>nd</sup> and 5<sup>th</sup> ground of appeal Mr. Daudi Mwang'onda stated that, despite the objection on the admission of the invoice and the delivery note, they were admitted upon the overrule of the Preliminary Objection by the trial court. On that account Mr. Mwang'onda formed an opinion that, it was thus proper for the court to make reliance on them. As for the forensic report, Mr. Mwang'onda stated that, the order to make reference to the bureau was vacated by the court, which means that there was no report of such nature. On the issue of signing two different ink pens on the invoice and delivery note, the counsel claimed that, normally pens run out of ink. He contended that, there is no law which compels that, when ink runs out the same colored ink pen should be sought for continuation of signing.

Concerning the consignment, that, its documents were issued on different date with the signing date Mr. Daudi Mwang'onda was of views that, the said documents are genuine. He gave the reasons that, the same were signed, because the 1<sup>st</sup> appellant got the consignment, otherwise he would not have signed them. He added that, the act of signing also shows

that the appellant had pressed for such order. He said that the two invoices being signed on two different dates do not invalidate them.

Concerning exhibit P4, the employment contract, the Respondent's counsel was of the views that, the record is vivid that, all appellants do not dispute that the 1<sup>st</sup> appellant entered employment contract with the respondent and the rest of the appellants stood as guarantors. He added that, P4 just established the relationship that the company (respondent) had with the Appellants. The Counsel submitted that, the appellants do not dispute that, whatever fallen into that exhibit, does not change the position that the 1<sup>st</sup> appellant was employed by the respondent and the other appellants were his guarantors.

Concerning the third and fourth grounds of appeal Mr. Daudi Mwang'onda made reference to his earlier submissions on ground number one and added that, there were no material contradictions that go to the root of the case. He further submitted that, the evidences of the appellants were also considered during the composition of the judgment by the trial court.

Concerning the sixth ground of appeal Mr. Daudi Mwang'onda submitted that, the general ledger book which was admitted as exhibit P5 shows that, the total products that the 1<sup>st</sup> appellant was entrusted had



the value of 72 million shillings. He added that, the evidence shows that, the appellant had deposited only 25 million in return leaving a balance of 47 million un-deposited. He contended that, this fact is found in paragraph 7 of the plaint. On that account, Mr. Mwang'onda was of views that, there is no contradiction on the amount claimed. He however called the complaint by the appellants on the General Ledger at this stage is an afterthought.

In rejoinder Mr. Mvungi just reiterated his submissions in chief, and that was the end of both parties' submissions.

I have earnestly gone through both parties' submissions, authorities supplied and the available records. The issue to be determined is whether the appellant's appeal is meritorious.

Concerning the issue of pecuniary jurisdiction, both parties do not dispute that, it is the substantive damages which determines it. I have gone through the respondent's plaint in the trial court record and noticed it showing at paragraph 4 that the respondent claims for Tshs. 47 Million, being the proceeds amount from the sale of the products that the 1<sup>st</sup> appellant was entrusted to sell and return its money to the respondent. For easy of reference the said paragraph 4 of the plaint provides, as I hereunder quote; -

*"That the plaintiff's claim against the defendants jointly and severally is for the payment of Tshs 47,065,160.00 (forty-seven million sixty-five thousand one hundred sixty) being the value of cottons of water and soda which the 1<sup>st</sup> defendant was entrusted by plaintiff as its employee to sell and deposit the money to the plaintiff's bank account and submitted the bank pay in slip to the plaintiff"*

It is vivid that, this is not the claim that depends on the discretion of the court whether to grant it all or to reduce it. What is seen in the quoted paragraph is actually a specific amount that the respondent claimed. Though in paragraph 9(a) of the plaint the respondent named it a general damages, yet, the fact that it is the same amount pleaded in paragraph 4 of the plaint, its nature is clear that it is specific or substantive damages. On that account, I do not hesitate to call the words "general damages" as appearing in paragraph 9(a) of the plaint, a typing error as submitted by the respondent's counsel. On that account, this point on the first ground of appeal fails.

Concerning the issue of expiry of the speed truck, whether the proceedings made thereafter are a nullity or not, firstly, I would like to

make it noted that, speed tracks of the case are set so as to plan and so dispose of cases timely and expeditiously. It follows therefore that, speed tracks are not set for interfering the litigants' justice.

This is a position of the law as per the current decision of the Court of Appeal decision in **NATIONAL BUREAU OF STATISTICS V. THE NATIONAL BANK OF COMMERCE & ANOTHER (Civil Appeal No. 113 of 2018) [2021] TZCA 210; (18 May 2021)**. In that case, the Court of Appeal had an opportunity to examine the fate of a suit whose speed track had expired before the case was concluded. The High Court had decided to strike out the suit, but in appeal the Court of Appeal overruled the said decision. It endorsed the reasoning and decision of its case made in **MRS. ASHA RAMADHANI LASEKO V. RAMADHANI ALI LASEKO** in which it was held;

*"While the policy reason for speed track is weakened or over defeated if they (the speed tracks) are not strictly observed yet non-observance can be occasioned by a party to a case or by the Court itself, sometimes for unavoidable reason. If, for example, a case lasts beyond the assigned speed track because the Court itself could not finalize it in time why should the*

*plaintiff as a result be deprived of a decision of the Court for no fault of his own? Surely order VIII A of the Civil Procedure Code, 1966 as amended by G. N No. 422 of 1994 was intended to improve the quality of Civil justice by making it speedier, not to provide occasion for depriving justice to the parties without any fault attributable to them".*

The above holding is in appreciation of the facts that, the purpose of introducing legal provisions on speed track was to facilitate speedier disposal of suits. As such ordering retrial of a suit that has otherwise been properly disposed, save for expiry of its speed track, will be legally illogical and purposely counterproductive. For this reason, I find no merit in this ground of appeal.

Concerning the issues raised in grounds of appeal number two and five, the same are unmeritorious as well. This is for the reasons that, at page 43 of the typed proceedings the trial court, after their genuineness being questioned, vacated its order for signature investigation to the forensic bureau instead, it ruled out on the admissibility of the invoice and delivery note. The records provide that, the court weighted the documents and admitted them as exhibits. With this stance, the court was obliged to

rely on those documents after it had taken them fit for admission. It is therefore my considered view that blaming the court to make reliance on the documents it had cleared for admission is misconception.

There is also a complaint that the 1<sup>st</sup> appellant's signature in the employment contract does not tally with those seen in the invoice and the delivery note. Upon comparing them through my own naked eyes, I find the said 1<sup>st</sup> appellant's signature in the employment contract which the appellants do not dispute, with the ones found in the invoice and the delivery note resembling. The only differences that can be seen are minor, which under normal circumstances do appear according to the posture that the signatory had, at the time of signing.

Equally, on the issue of different ink pens being used for signing, as rightly observed by the respondent that, pens run out of ink, whenever that situation happens and circumstances command speed dealing with the papers, it is obvious that, any pen at disposal can be used. Moreover, the different ink pens can be found on different documents. For that reason alone, even the signing time and place might be different too. These also may be the determinants for the different ink pens being used by the time of signing. However, the invoice and delivery note, of course, do save for the purpose that, the 1<sup>st</sup> appellant was truly handed with, and

actually departed from the respondent with its products. This fact, leave alone being proved by the invoice and the delivery note, yet the same fact has been proved by PW2 and PW3, the drivers who transported the respondent's products entrusted to the 1<sup>st</sup> appellant, to the destinations of the 1<sup>st</sup> appellant's choice.

With respect to the exhibit P4 which is the employment contract between the 1<sup>st</sup> appellant and the respondent, as correctly submitted by the respondent that, the same saves for the relationship that the two parties had. That said relationship, has been proved even in the absence of the said contract. The appellants herein never disputed at any time that the 1<sup>st</sup> appellant was employed by the respondent as the Sales Agent for the respondent's products. That is why even the 1<sup>st</sup> appellants' guarantors have effectuated their binding papers which were signed before the Government authorities. The said papers have the guarantors' photos annexed therein. And of course, in the said employment contract, among the conditions was for the 1<sup>st</sup> appellant to submit the pay-in-bank slip to the respondent after the sale of the entrusted products. That issue was not objected by the 1<sup>st</sup> appellant as it can be seen in his own testimony during trial. With this endeavor, I find it that, the intended relationship between the appellant and respondent had been successfully established.

For that reason, I find these grounds of appeal No. 2 and No. 5 unmeritorious.

In respect to the 3<sup>rd</sup> ground of appeal, which involves the issue of non-consideration of the appellants' evidence. This being the first appellate court is enjoined with powers to step into the shoes of the trial court and re-evaluate the evidence by taking both evidence into consideration. However, this is done in case it is truly proved that the appellants' evidence was actually not considered by the trial court during the composition of its judgment.

I have gone through the trial court's judgment particularly at page 5 through 6 of it and noticed that, in her reasoned analysis, the trial Magistrate deeply considered the 1<sup>st</sup> appellant's defense. She talked of the 1<sup>st</sup> appellant's dispute to have taken consignment on the alleged date and denial of the signatures appearing on the invoice and the delivery note. In her judgment the trial Magistrate also observed that it was correctly, and not disputed by the 1<sup>st</sup> appellant that, the respondent's General Ledger book shows the dates, the value of the consignment that the appellant had taken, plus the amount of money that the appellant had deposited thereafter. She also stated that the appellant never objected the admissibility of this exhibits. As such, the trial Magistrate found out

that, denial of them is an afterthought and the said defense lacks merit. No more consideration of the appellant's denial one could have done, than this that the trial Magistrate has done. The general ledger book shows that the appellant took from the respondent the consignment valued Tshs. 72 million. In return he deposited into the respondents account the amount of Tshs. 25 million. Act of the appellant not to object its admissibility is as good as admitting the facts therein, which in turn proves the genuineness of the invoice and the delivery note.

Concerning the 4<sup>th</sup> and 6<sup>th</sup> grounds of appeal which based on the contradictions that appear in the evidences adduced during trial, position of the law is that, this court is duty bound to find the same and rule out if available, whether the same go to the root of the case or not.

As for the amount claimed, Exhibit P5 which is the General Ledger shows that, the 1<sup>st</sup> appellant was handled with cartons of soda and water amounting Tshs. 72,065,160/= . The evidence goes on showing that, the 1<sup>st</sup> appellant deposited Tshs. 25,000,000/= thus remains with the deficit of Tshs. 47,065,160/= . This fact is the same that appears in paragraph 7 of the plaint. That pleading in paragraph 7 of the plaint, plus the testimony of PW4 (Ally Khalfan), when put together with the exhibit P5 (the General Ledger book) which provides the same evidence, and that the 1<sup>st</sup> appellant



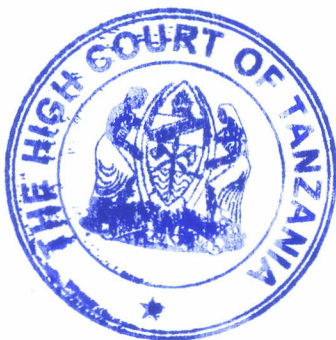
never disputed its admission, then there is no way one can say with certainty that, there is material contradictions in the respondent's case that require nullification of the whole case. On that account, I find it that, the minor errors on the figure of the amount that the respondent claims from the 1<sup>st</sup> appellant, is cured by the above endeavors and the 1<sup>st</sup> appellant's act of admitting the facts of the exhibit P5. For those reasons I find these grounds of appeal too fail.

As all the appellants' grounds of appeal have proved failure as per the foregone analysis, I find the appellants' appeal unmeritorious. Hence dismissed. Appellants to bear the costs.



**S.M. KULITA**  
**JUDGE**  
**22/09/2023**

**DATED** at **SHINYANGA** this 22<sup>th</sup> day of September, 2023.



**S.M. KULITA**  
**JUDGE**  
**22/09/2023**

