IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

PC CIVIL APPEAL NO. 25 OF 2023

(Arising from Civil Appeal No. 3 of 2023 District Court of Bukoba; Originating from Civil Case No. 367 of 2022 at Bukoba Urban Primary Court)

TENGA KAILEMBO KAJUGIRA..... APPELLANT

VERSUS

DEODATUS T. RWEYEMAMU..... RESPONDENT

JUDGMENT

9th and 28th November, 2023

BANZI, J.:

On 1st November, 2022, the respondent instituted a suit before Bukoba Urban Primary Court ("the trial court") against the appellant claiming payment of Tshs.6,000,000/= being a refund of money he paid him to purchase a car which he later returned back to him after finding it to be below the standard.

It is on record that, the respondent requested the appellant who is the car dealer to find him the car for purchase. Sometimes later, the appellant informed the respondent that, there is someone selling his car for Tshs.7,000,000/=. On the appellant's request, the respondent advanced him Tshs.1,000,000/= by depositing it in his account on 25th August, 2022. Then

through his father (SM2), on 26th August, 2022, he deposited another amount Tshs.5,000,000/= while promising to pay the remaining amount of Tshs.2,000,000/= by December. It was on the same date, when the appellant handed over the car to SM2 as the respondent was not around. He produced pay in slips (Exhibit A1, A2 and A3) to prove the transactions. After his return, he went to look at the car in question but he was not contented, hence, after discussion, the appellant took back the car and promised to look for another customer in order to return his Tshs.6,000,000/=. According to the respondent, the appellant has never returned that money. Their friend, SM3 also told the trial court that, on 30th August 2022, he was informed by the respondent about the car in question. In September, the respondent informed him that the car was not in good condition and he advised them to reconcile. On 15th September, 2022, in an attempt to reconcile them, he called the appellant who agreed to refund the respondent Tshs.6,000,000/=. Later, he asked the appellant if he had already paid the appellant and he told him no.

In his defence, the appellant conceded to have sold that car to the respondent for Tshs.7,000,000/= who paid Tshs.5,000,000/= vide his account with the promise to pay later the remained amount of Tshs.2,000,000/=. He handed over the car to the respondent through SM2.

One week before payment of the remained amount, the respondent called and told him that, he had a problem, hence, he cannot pay the remained amount. He asked him to take back the car and give him Tshs.3,000,000/=. Upon such information, the appellant went to take the car and found all tyres were flat. He changed them and took it. Around four o'clock, he met with the respondent and handed him over Tshs.3,000,000/=. The respondent told him to remain with the rest of the money and directed him to find him another car. However, things did not go as per plan. After he found another car, the respondent rejected it on the reason that, its fuel consumption was very high. He found another car but the respondent refused to buy claiming that, it was below his status. After the deal failed to sail through, the respondent demanded to be paid the remaining amount of Tshs.3,000,000/= but before he could pay, he was taken to court.

His evidence was supported by Makame Rashidi (SU2) who stated that, in August, 2022 while he was going to Muhutwe to see his sick mother, the appellant gave him a lift. They went up to Katerero where they met with the respondent. The appellant took a parcel and gave it to the respondent who opened it. It was at that point, when SU2 realised that, the parcel contained money in three bundles of Tshs.10,000/= notes per each. The respondent counted them and confirmed to be Tshs.3,000,000/=. He insisted to have

witnessed the appellant handing over Tshs.3,000,000/= to the respondent although he did not know for what purpose.

After hearing the evidence of both sides, the trial court was satisfied that the appellant had already paid Tshs.3,000,000/= out of Tshs.6,000,000/=. It ordered the appellant to pay the unpaid balance of Tshs.3,000,000/=. Aggrieved with that decision, the respondent appealed to Bukoba District Court (the first appellate court) which decided in favour of the respondent after being satisfied that, the appellant had never paid any money to the respondent. It ordered the appellant to refund the respondent Tshs.6,000,000/=. Such decision agitated the appellant who appealed to this Court on four grounds, thus:

1. *THAT, the first Appellate Court erred in law and in fact to overturn the trial Court decision on the fact that the payment of Tsh.3,000,000/= three million shillings was never proved was for what purpose without taking into consideration that the Appellant had made party payment.*
2. *THAT, the first Appellate Court erred in law and in fact to hold that the Respondent failed to prove the case on a balance of probability.*

3. *THAT, the first Appellate Court erred in law and in fact to hold that the trial court miserably failed to analyze and evaluate the evidence hence a wrong Decision.*
4. *THAT, the first Appellate Court erred in law and in fact to (sic) for failure to raise the issue analyze, evaluate the evidence on record and back up the judgment with reason for the said Decision.*

At the hearing, Mr. Rogate Assey, learned advocate appeared for the appellant whereas, the respondent was represented by Mr. Projestus Mulokozi, learned advocate.

In his submission, Mr. Assey argued the first and fourth grounds separately while the second and third grounds were argued jointly. Arguing in support of the first ground, Mr. Assey stated that, the appellant accepted to receive a total of Tshs.6,000,000/= from the respondent as purchasing price for the car in question and when the respondent rejected the car, the appellant took it and refunded him Tshs.3,000,000/= in the presence of SU2. In that regard, it was right for the trial court at page 8 of its judgment to conclude that, the unpaid amount was only Tshs.3,000,000/=. Therefore, the first appellate court misdirected itself by relying on the evidence concerning mediation and concluded that, the unpaid money was Tshs.6,000,000/= without considering that, in the said mediation, the

appellant agreed to refund the respondent Tshs.3,000,000/= and not Tshs.6,000,000/=.

Concerning the second and third grounds of appeal, he submitted that, the evidence adduced by the appellant and SU2 proved on the balance of probability that, the appellant had paid Tshs.3,000,000/= and remained with unpaid amount of Tshs.3,000,000/= as correctly found by the trial court. Hence, the first appellate court erred to overturn the findings of the trial court. Concluding with the fourth ground, Mr. Assey argued that, the first appellate court failed to raise issues, analyse them and give reasons for its decision. To him, the learned magistrate failed to give reasons for faulting the decision of the trial court. Thus, he urged this Court to allow the appeal with costs.

In his reply, Mr. Mulokozi submitted that, it is not disputed that the appellant received Tshs.6,000,000/= from the respondent after selling the car that was later rejected. The dispute is whether the appellant has ever refunded the respondent Tshs.3,000,000/= and remained with unpaid amount of Tshs.3,000,000/=. On his side, he supported the decision of the first appellate court because the appellant failed to prove on the balance of probability that, he made part payment of Tshs.3,000,000/= to the respondent. He further stated that, the evidence of SU2 who contended to

have witnessed the part payment of Tshs.3,000,000/= in August, 2022, has nothing to do with this dispute because by the time SU2 alleges to have witnessed that payment, the dispute between the two had not yet ensued.

Moreover, he cited paragraph 2 (3) of the Schedule to the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulation, ("the Rules of Evidence") and submitted that, the appellant had a duty to prove those facts to excuse himself from liability of the claim but he failed to execute such duty. He even failed to cross-examine the respondent on the issue of part payment of Tshs.3,000,000/=. He supported his stance with the case of **Jafari Salum @ Kikoti v. Republic** [2020] TZCA 221 TanzLII which underscored that, failure to cross-examine implies acceptance of witness's testimony. He insisted that, failure of the appellant to cross-examine the respondent on the claim of Tshs.6,000,000/= implies that, he accepted such evidence and he is estopped to ask this court to disbelieve such evidence. Besides, the evidence of SU2 cannot assist him to prove that part payment which according to his evidence, such payment was made before the dispute ensued.

Returning to the fourth ground, Mr. Mulokozi submitted that, the judgment of the first appellate court was proper because on appellate stage, the court determines the grounds of appeal and not issues and the same

was done by the first appellate court as reflected at page 4 of the judgment. For that matter, the evidence of the respondent was heavier than that of the appellant as per requirements of paragraph 6 of the Rules of Evidence. He urged this Court to uphold the decision of the first appellate court and dismiss the appeal with costs.

In his rejoinder, Mr. Assey insisted that, part payment of Tshs.3,000,000/= was proved by SU1 and SU2, therefore, the contention that the same was made before the dispute ensued is baseless because the transaction was conducted in August and the respondent stayed with the car for one week before the dispute ensued. In that view, the argument that the dispute arose one week before completion of payment is not true. He further argued that, the judgment of the first appellate court was not proper because it failed to raise issues, analyse them and give reasons for faulting the decision of the trial court. On the issues of failure to cross-examine, he submitted that, at page 12 of the proceedings, the respondent cross-examined the appellant about payment of Tshs.3,000,000/=. Nevertheless, in his testimony, the respondent did not state about payment of Tshs.3,000,000/=, that is why the appellant did not cross-examine him on that issue. According to him, the cited case of **Jafari Salum @ Kikoti v. Republic** (*supra*) is distinguishable because being a criminal case, its

standard of proof is beyond reasonable doubt unlike the case at hand which requires proof on balance of probability. He concluded his submission by stating that, the respondent had a duty to prove that Tshs.3,000,000/= paid to him by the appellant was for another purpose other than a refund of purchasing price.

After a thorough perusal of the records of two courts below and carefully consideration of the submissions by learned counsel for both parties, the only issue calling for my determination is whether the appeal has merit.

This is a second appeal whereby there are two diverging decisions of the lower courts. On the one hand, the trial court decided partly in favour of the respondent by concluding that, the appellant had already refunded the respondent Tshs.3,000,000/=. On the other hand, the first appellate court found that, the appellant had not refunded any amount to the respondent and thus, he was ordered to pay the whole amount Tshs.6,000,000/=. Under these circumstances, interference of findings concerning evidence is inevitable. Thus, I am going to start with the first, second and third grounds which will be determined jointly because in my view, they revolve around the issue of evidence and its evaluation.

It is undisputed that, the respondent paid the appellant Tshs.6,000,000/= for purpose of purchasing the car out of agreed purchasing price of Tshs.7,000,000/=. It is also not in dispute that, the appellant took back the car after the respondent had rejected it. The only contentious issue is whether the appellant refunded the respondent Tshs.3,000,000/= out of Tshs.6,000,000/=. While the trial court was satisfied that, the evidence of the appellant proved the refund of Tshs.3,000,000/=, the first appellant court by relying on the testimony of SM3, arrived into different conclusion that, nothing was refunded to the respondent.

Looking at his testimony before the trial court, the respondent claimed that, after returning back the car to the appellant, he looked for another purchaser but the appellant was demanding higher price. After seeing that, the car is not sold, the respondent asked the appellant to return it to him but he should buy for Tshs.5,000,000/= and the rest of the money would be used for maintenance. However, the appellant informed him that, the owner will not accept and hence, he will find his own money to refund him. Then, the appellant told him that, he will bring another car. When he brought the same, he asked him to top up Tshs.3,000,000/= but the respondent refused and asked him to refund his money as he was no longer interested to do

business with him. Another attempt to bring him another car did not bear fruits.

The testimony of the respondent on how the appellant took back the car and failed to refund him his money did not receive any backlash from the appellant. In other words, the appellant failed to cross-examine the respondent on these vital aspects which, as matter of law, it connotes acceptance of the truthfulness of the respondent's testimony. It was stated in the case of **Shadrack Balinago v. Fikiri Mohamed @ Hamza & Others** [2018] TZCA 215 TanzLII that:

> *"As rightly observed by the learned trial judge in her judgment, the appellant did not cross-examine the first respondent on the above piece of evidence. We would, therefore, agree with the learned judge's inference that the appellant's failure to cross-examine the first respondent amounted to acceptance of the truthfulness of the appellant's account."*

Furthermore, the appellant did not ask the respondent any question in respect of his claim of payment of Tshs.3,000,000/=. If his claim was genuine, it was expected to be revealed in the course of testimony of the respondent. His silence implies that, whatever he said later is nothing but an afterthought.

Reverting to the evidence of the appellant, he claimed that, one week before the final payment of purchasing price, the respondent called him and informed him that, he has financial problem, hence, he could not pay the remained amount. He asked him to take back the car and to give him Tshs.3,000,000/=. For ease reference, I find it prudent to quote what was said by the appellant before the trial court:

> *"...ilibaki kama wiki moja ili amalizie zile 2,000,000 SM1 alinipigia simu na kuniambia kuwa amekuwa na tatizo hivyo hataweza tena kunilipa amepata tatizo na kuwa nikachukue gari niwe nayo na nimpe Tsh 3,000,000/= nilienda na kuchukua lile gari na nilikuta matairi yote yapo chini hivyo niliyatoa. Baada ya kutoa hiyo gari jioni kwenye majira ya saa kumi nilikutana na SM1 na nilimkabidhi 3,000,000/=na kuwa fedha nilizo nazo nikae nazo na kuwa akipata fedha nyingine basi ataniongezea achukue gari lingine."*

His testimony was supported by SU2 who claimed to witness the appellant handing over the respondent Tshs.3,000,000/=. According to him, such handing over was done in August, 2022. Since the appellant who was the defendant at the trial court alleged to have paid the respondent Tshs.3,000,000/=, according to paragraph 2 (3) of the Rules of Evidence, he had the duty of proving that fact. It is important to underscore that, in

proving transactions involving payment of money, in the absence of documentary evidence, oral evidence must be cogent, precise on details and supported by another person who eye-witnessed the transaction.

In the matter at hand, unlike the respondent who tendered deposit slips to prove his claim, the appellant did not produce any document to support his assertion concerning the alleged part payment. Besides, according to the extract above, the appellant did not state exact date or place he claimed to meet with the respondent and paid him Tshs.3,000,000/=. In his testimony, from the beginning to the end, he did not mention SU2 to witness the alleged handing over of Tshs.3,000,000/=. Apart from that, there is contradiction between the evidence of the appellant and SU2 concerning when such payment was made. While the appellant said it was one week before payment of last instalment, SU2 stated to witness such payment in August, 2022. It should be noted and recalled that, according to testimony of the respondent which was not challenged by the appellant, the last instalment of Tshs.2,000,000/= ought to be paid in December. Definitely, one week before December could never be August. It is the considered view of this Court that, this contradiction between the appellant and SU2 goes to the root of the matter concerning repayment of

Tshs.3,000,000/= which is the centre of controversy between the appellant and the respondent.

Apart from that, as correctly observed by learned magistrate of the first appellate court, a mere look at the evidence of SM3 reveals that, by 15th September, 2022, the appellant had not yet paid the respondent the alleged Tshs.3,000,000/=. At page 8 of the proceedings of the trial court, SM3 had this to say and I quote:

> *"...nami nilimwambia kuwa wakubaliane 15/09/2022 baada ya kuona hawajaelewana nilimpigia simu SU1 na kumuuliza alisema kuwa atamrudishia SM1 fedha yake 5,000,000/= na kuwa pia anamdai 1,000,000/= nyingine SM1 alimkopesha nilimuambia SU1 tukutane tufanye suluhu, nilipokuwa Dodoma nilimuuliza SU1 kama ameshalipa fedha hiyo au SM1 alinieleza kuwa bado hajalipa..."*

According to the passage above, it is obvious that, by August, the appellant had not yet paid the respondent contrary to what has been stated by SU2. Worse enough, the appellant did not cross-examine SM3 on this material evidence which is deemed to have accepted it and he is estopped from asking this Court to disbelieve what was stated by SM3. See the case of **Bomu Mohamedi v. Hamisi Amiri** [2020] TZCA 29 TanzLII.

Basing on analysis above, it is clear that, the appellant who alleged to have repaid the respondent Tshs.3,000,000/= had failed to prove such claim on the required standard. Thus, with due respect, the argument by Mr. Assey that, the evidence of SU1 and SU2 proved the alleged part payment of Tshs.3,000,000/= is unfounded. Apart from that, had the trial court analysed properly the evidence of both sides, it couldn't have reached into the conclusion that, the appellant had already paid the respondent Tshs.3,000,000/=. In that regard, the first, second and third grounds lack merit.

The last ground need not detain me. As correctly submitted by Mr. Mulokozi, the District Court was dealing with appeal as the first appellate court and not original suit as the trial court. Its duty was to resolve the grounds of appeal and not to answer issues as framed in the trial court. Reaffirming its position stated in the case of **Malmo Montagekonsult AB Branch v. Margret Gama**, Civil Appeal No. 86 of 2001 (unreported), the Court of Appeal through the case of **Francis Mtawa v. Christina Raja Lipanduka** [2022] TZCA 719 TanzLII had this to say:

> *"In the first place,* ***an appellate court is not expected to answer the issues as framed at the trial****. That is the role of the trial court.* ***It is****, however,* ***expected to***

> ***address the grounds of appeal before it.*** *Even then, it does not have to deal seriatim with the grounds of appeal as listed in the memorandum of appeal.* ***It may, if convenient, address the grounds generally or address the decisive ground of appeal only*** *or discuss each ground separately."* (Emphasis supplied).

In the matter at hand, looking at the grounds of appeal raised by the respondent, they all fell into one issue concerning evidence. The learned magistrate before allowing the appeal, although briefly, he analysed and evaluated the evidence of the trial court and arrived into his own conclusion which as a matter of law, he was exercising his duty as the first appellate court. It was through such analysis and evaluation when he concluded that, the trial court arrived into wrong decision after failing to analyse and evaluate the evidence before it. Under these circumstances, I cannot agree with the argument by Mr. Assey that, the judgment of the first appellate court had no reason for the decision. Thus, the fourth ground also lack merit.

Basing on the reasons stated above, it is the finding of this Court that, the respondent's evidence carried more weight than the appellant's evidence. In other words, the appellant had failed to prove that, he refunded the respondent Tshs.3,000,000/=. Consequently, I dismiss this appeal with

costs by upholding the judgment of the first appellate court which quashed and set aside the judgment and orders of the trial court.

It is accordingly ordered.

I. K. BANZI
JUDGE
28/11/2023

Delivered this 28th day of November, 2023 in the presence of the appellant and the respondent both in person. Right of appeal duly explained.

I. K. BANZI
JUDGE
28/11/2023