IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

(PC) CIVIL APPEAL NO. 12 OF 2023

(C/F Civil Appeal No. 3 of 2023 of Same District Court; Original Shauri la Madai Na. 74 of 2022 of Same Urban Primary Court)

PHILIPO ZEBEDAYO LYIMO ..... APPELLANT

VERSUS

CHEDIEL ELINIANGAZWE MSUYA ..... RESPONDENT

JUDGMENT

10/10/2023 & 23/11/2023

SIMFUKWE, J.

This is the second appeal. The factual background of the matter briefly is that, the respondent herein instituted a civil case against the appellant before Same Urban Primary Court (the trial court) claiming Tshs 918,000/=. The genesis of the dispute is to the effect that the appellant agreed to sell his car to the respondent for a consideration of Tshs 2,000,000/=. It was alleged that the first instalment which was advanced to the appellant was Tshs 700,000/-. That, after receiving the car, the respondent found that the car was defective and he used Tsh 218,000 to repair it. It was also alleged by the respondent that he returned the car

to the appellant following the agreement between them. Thus, the respondent filed a suit claiming Tshs 918,000 advanced to the appellant as part payment of the purchase price plus the amount he incurred to repair the said car. The allegation was disputed by the appellant who alleged before the trial court that the car was still possessed by the respondent.

After full trial, the trial court found that the appellant could not return the money advanced to him as the respondent was still in possession of the car. The trial court advised the respondent to return the car to the appellant so as to have the right to claim the refund of the money paid to the appellant as advance. The appellant herein was aggrieved, he filed an appeal before Same District Court unsuccessfully. Still aggrieved, the appellant preferred the instant appeal under the following grounds:

1. *That the 1st appellate Court erred in law and fact in basing on the tendered evidence by the Respondent (exhibit P1) and deciding that in seeking help suggests and existing problem with the car though not disclosed in the letter. (sic)*
2. *That the first appellate Court grossly erred in law and fact in upholding the first trial court decision without giving the legal reasoning.*
3. *That the decision of the 1st Appellate Court erred in law and fact in failing to properly evaluate the evidence on record. (sic)*

During the hearing of the appeal which proceeded by way of written submissions, both parties were unrepresented.

Supporting the first ground of appeal, the appellant among other things submitted that, it is not disputed that the parties herein had entered into a sale agreement of a car in which the appellant sold his corolla Salon vehicle with Registration No. T. 373 AGA to the respondent. That, during the trial the appellant testified to the effect that he sold the said vehicle while in a good condition and that he did not give the registration card of the vehicle to the respondent because the respondent was yet to accomplish the purchasing payments. That, his evidence was supported by the evidence of SU2, SU3 and SU4.

The appellant state further that, he impliedly informed the Police of the situation which forced him to hold the vehicle registration card. That, it is not certain why the 1st Appellate court magistrate drew negative inference on the said exhibit. He said that, it is trite law that every witness is entitled to credence and must be believed and his testimony accepted, unless there are good reasons for not believing a witness as held in the case of **Goodluck Kyando vs Republic [2006] TLR 363.**

The appellant contended that, no good reason was adduced by both lower courts in not believing his testimony. That, the exhibit is clear and there is nowhere it is written that the car was in bad condition as the lower Courts tried to insinuate. That, the respondent freely entered into the contract with him and agreed to purchase the said car. Thus, the findings by the lower courts that the car was not in good condition are unfounded.

He urged this court to interfere the findings of the lower courts which led to miscarriage of justice to him.

The appellant opted to submit on the 2nd and 3rd grounds of appeal jointly. He submitted that the decision of the first appellate court lacks legal reasoning. He illustrated that, the duty of courts is to measure the weight of evidence adduced by both parties together with their witnesses, test its credibility prior to composing a verdict in the contested facts in issue. He referred to the case of **Stanslaus R. Kasusura and A.G vs Phares Kabuye [1982] TLR 338** which held that:

> *"The trial Judge should have evaluated the evidence of each of the witness, assessed their credibility and made a finding on the contested fact in issue."*

It was stressed that, the trial court's judgment as well as the 1st appellate magistrate failed to analyse the adduced evidence. That, no credible reasons were given to justify the decisions reached. That, the courts implied speculations that are not backed up by any proof.

Finally, on the fourth ground of appeal, the appellant informed the court that the Appeal was filed within time. He prayed the appeal to be allowed by quashing and setting aside the decisions of lower courts with costs.

In reply to the first ground of appeal, the respondent submitted to the effect that, it is true that **exhibit P1** was the evidence that the car was unfit and the appellant admitted to had knowledge of the said problem. That, the appellant admitted that he was the one who wrote it and he did not challenge the said Exhibit before the trial court. Thus, the

appellant impliedly admitted that the car was unfit. The respondent commented that the trial court and the first appellate court had justifiable reason to rely on the tendered evidence by the respondent to suggest that the car was unfit.

Contesting the second and third grounds of appeal, the respondent argued that, it is the cardinal principle that the first appellate court has a duty to go through the evidence on record, analyse and evaluate it. He said that the same was done in this case. He made reference to the judgment of the first appellate court from page 8 to 11 and argued that the magistrate analysed and evaluated the evidence on record and found that the ground of appeal brought by the appellant had no merit. That, the appellate magistrate gave credible legal reason to justify her decision.

In his final remarks, the respondent prayed the court to dismiss the appeal with costs and uphold the decisions and judgment of the lower courts.

In rejoinder, the appellant denied to had acknowledged that the car was unfit as submitted by the respondent. He added that, nowhere it is written and proved that the car was unfit. Thus, the lower courts erred to hold that the car was unfit as the car was fit and moved all the way from the appellant to the respondent at Same.

Furthermore, the appellant argued that the one who alleges has a burden of proof. He referred to **section 110 of the Evidence Act**, **Cap 6 R.E 2022**. He blamed the respondent who was the claimant for shifting the burden to him. He stated that there is distinction between burden of

proof and onus of proof as a matter of law and pleadings as a matter of adducing evidence is essential. He referred to **Sakar on Evidence in India, Pakistan, Bangladesh, Burma & Ceylon**, 14th Edition 1993 at page 1338 where it was stated that:

> *"An essential distinction between the burden of proof and onus of proof is that the burden of proof never shifts, but the onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence."*

It was further argued that the standard of proof in civil cases is on balance of probabilities and such burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his burden. That, the burden of proof is never diluted on account of weakness of the opposite party's case. To buttress the argument, he referred to the case of **Paulina Samson Ndawavya vs Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017, CAT, (unreported)

In the present case, it was argued that the respondent has a burden of proving that the car was unfit. The appellant kept on emphasizing that the car was fit that's why they entered freely into agreement over the same and the buyer had to rely on the principle of *caveat emptor* a doctrine which warns the buyer to be conversant with the details of an agreement before committing to its terms.

I have keenly gone through the lower courts' records as well as parties' submissions. It may be noted that there are concurrent findings of the lower courts. Thus, as a second appellate court, I am refrained from

disturbing the concurrent findings of the lower courts unless it is found that there is misapprehension of evidence, violation of some principles of law and/or practice, miscarriage of justice, existence of obvious errors on the face of the record or misdirection or non-directions on the evidence. This has been stated in numerous decisions including the famous case of **Amrathlar Damadar and Another v. A.H. Jariwalla [1980] TLR 31.**

The appellant in this appeal raised four grounds of appeal. On the first ground of appeal, briefly, the appellant was irritated by the act of the first appellate court to rely on exhibit P1 and conclude that the car which was sold to the respondent was not in a good condition. He insisted that, the car was fit that's why the respondent entered into contract with him.

The respondent argued that, the appellant admitted to have knowledge of the said problem as he was the one who wrote the letter. The respondent explained further that the appellant did not challenge the said exhibit before the trial court. I reserve the determination of this ground of appeal as the same will be discussed together with the third ground of appeal.

In respect of the second ground of appeal that the first appellate court decision lacks legal reasoning, I am aware that the judgment among other things should contain decision and reasons for such decision. In the present case, on the outset, the appellant's contention is unfounded. Before the first appellate court, the appellant raised five grounds of appeal. The appellate magistrate discussed the grounds of appeal one after another as seen from page 8 to 10 of the typed judgment. The

findings in each ground show the opposite of what the appellant is trying to insinuate.

On the third ground of appeal, the appellant contended that the first appellate court did not evaluate the evidence properly. The same ground was raised and placed for determination before the first appellate court. The appellant complained that, the trial court did not evaluate properly the evidence which was before it. The centre of his grievance was that the trial court considered the evidence of the respondent only which was contradictory, insufficient and failed to note that Tshs 1,300,000 was not yet paid to the appellant that's why the registration card of the car was still with the seller.

While discussing this ground of appeal, at page 10 the first appellate court had this to say:

> *"Before this court, the submissions are devoid of the said evidence contradictory. The appellant did not specifically point out the said evidence pictured in trial court records. It would have been different if he aired it out. He further complained of un dissolved agreement since Tshs 1,300,000/= was yet to be paid by the respondent to him. He stressed that the trial court should have found his right to be paid the amount. Now, this is a right he asserts to have but as discussed in the 2nd ground, the (sic) it was vitiated in the event of the car being defective."*

Since there are allegations that the first appellate court did not properly evaluate the evidence, this being the second appellate court will step into the shoes of the second appellate court and re-evaluate the same. See the case of **Director of Public Prosecution vs Lengai Ole Sabaya and 2 Others** (Criminal Appeal No. 231 of 2022) [2023] TZCA 17853(17 November 2023) Tanzlii at page 28 where it was stated that:

> *"Following the foregoing finding, we think the High Court should have proceeded to evaluate the remaining evidence; whether it proved the guilt of the respondents to the hilt. Instead, it went on to evaluate the same in answer to the issue whether a retrial should be ordered. Now that the first appellate court did not do what it ought to have done, we step into its shoes and do what it did not do and come to our own conclusion."*

According to the evidence adduced before the trial court, the car was sold to the respondent herein for a consideration of Tshs 2,000,000/=. This was established by the evidence of SU1 (the appellant herein) and his witnesses. It is undisputed fact that the respondent herein paid Tshs 700,000/= as part of the said consideration.

However, evidence of SU1 and his witnesses to wit SU2 **Heriadi Jackson Mongi**, SU3 **Marry Zebedayo** and SU4 **Baraka Bilosi Marwe,** is to the effect that the car is in the hands of the respondent herein. Despite the fact that the car is still with the respondent herein, yet the respondent instituted the case to claim the amount which he gave the appellant as advance of the purchasing price.

This court is of the view that, the respondent cannot have the car and claim the amount which he paid to the appellant at the same time. As rightly submitted by the appellant herein, the lower courts failed to note that the remaining amount of Tshs 1,300,000/= was not paid to him to entitle the respondent to institute the case claiming back the advanced money which he paid to the appellant herein. Therefore, the trial magistrate erred to order the car to be returned to the appellant.

On the issue as to whether the car was in a good condition or not, before the trial court, the respondent testified that he bought the said car while the same was not in a good condition. As a matter of reference, at page 3 of the typed proceedings the respondent said that:

> *"Mdaiwa alinileta gari usiku ikiwa haina taa na side mirror na Mdaiwa…*
>
> *Baada ya fundi kuja alikagua gari tukiwa na Mdaiwa na fundi aligundua kuwa imekufa vitu vya gharama ya Tsh. 218,000….Tulikubaliana na mdaiwa kuwa gari ataniuzia kwa kiasi cha Tsh. 1,500,000/."*

The above evidence shows that the buyer (the respondent herein) agreed to buy the said car together with its defects. Had it been that the defect was noted after he bought the car, the respondent would be entitled to be paid the money which he used to repair the car. I am of considered opinion that the respondent was not entitled to the costs of repairing the car.

Having evaluated the trial court's evidence, as the second appellate court, I am of the opinion that the two courts mishandled the evidence. Since the respondent (buyer) is still in possession of the car as agreed, he should pay the appellant herein the remaining purchase price to the tune of Tshs 1,300,000/- so as to have full ownership of the car. Appeal partly allowed with costs.

It is so ordered.

Dated and delivered at Moshi this 23rd November, 2023.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

23/11/2023