

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TANGA SUB-REGISTRY

AT TANGA

CIVIL APPEAL NO. 12 OF 2023

(Arising from Civil Appeal No. 1 of 2023 of Kilindi District Court at Kilindi, Originating from Civil Case No. 19 of 2022 at Kwediboma Primary Court)

ABESSOLO JULIUS MBUTO APPELLANT

VERSUS

ALEX JUSTIN KIMARIO RESPONDENT

JUDGMENT

14/03/2024 & 17/04/2024

NDESAMBURO, J.:

In this appeal, the appellant challenges the decision rendered by the Kilindi District Court in Civil Appeal No. 01 of 2023, which emanated from the Kwediboma Primary Court in Civil Case No. 19 of 2022.

The brief facts of this appeal can be summarized as follows: The appellant initiated legal proceedings against the respondent at Kwediboma Primary Court, seeking among others reimbursement of Tshs. 10,075,000 for purchases of 155 sacks of maize. The records further show that payment was made partially through the respondent's bank account and partially in cash. Despite payment, the appellant alleged that the respondent failed to deliver the

agreed-upon maize. The Primary court ruled in favour of the respondent, prompting the appellant to appeal to Kilindi District Court on four grounds. However, his appeal was unsuccessful, leading to the present second appeal.

The grounds for the appeal are as follows:

- 1. That the first Appellate Court erred in law and fact for failure to consider the submission of the appellant in reaching its final decision.*
- 2. That the first Appellate court erred in law and fact for deciding in favour of the respondent based on weak and contradicting submissions.*
- 3. That the first appellate court erred in law and fact for deciding in favour of the respondent based on contradicting reasons.*
- 4. That the trial magistrate erred in law and fact for failure to consider the evidence adduced by the appellant to prove his claim hence arriving at a biased decision.*
- 5. That the trial magistrate erred in law and fact for failure to evaluate properly the evidence adduced by the appellant hence arriving at a wrong decision.*
- 6. That the trial magistrate erred in law and fact for failure to decide in favour of the appellant who managed to prove his claim within the required standards.*

During this second appeal, the appellant is represented by Mr. Adrian Ngunguru, a learned counsel while the respondent has the

service of Mr. Abdulkadri Athuman Mohamed, also a learned counsel.

Arguing on the first ground of appeal, Mr. Ndunguru asserted that during the appeal hearing, the appellant contended that the trial magistrate had disregarded the evidence presented by the appellant and his witness without giving any reasons. He further claimed that the District Court, in its judgment, acknowledged this oversight by the trial court on pages 29 and 30 but neglected to address it in its final decision.

Mr. Ndunguru contended that although the magistrate in the first appellate court had acknowledged this flaw, it was regrettable that the final decision did not address the weakness highlighted in the appellant's submission. As a result, the trial court's judgment lacks reasoning. Therefore, he urged this court to exercise its appellate powers to invalidate the decision of the Primary Court to rectify the defect in the interest of justice. He cited the case of **Amirali Ismail v Regina** 1 TLR 370, where it was held that a sound judgment is clear, systematic, and straightforward. Every judgment should delineate the facts of the case, substantiate each fact with specific evidence, and clearly articulate the reasons

justifying the findings. He argued that the magistrate's failure to provide reasons for disregarding the appellant's evidence rendered the judgment defective, lacking in rationale, and thus unjust to the appellant. To further bolster his argument, he referenced the case of **Omary Abdallah Kilua v Joseph Rashid Mtunguja**, Civil Appeal No. 178 of 2019 CAT (unreported).

On the second ground of appeal, he argued that upon scrutinising the submissions of the respondent's advocate throughout the judgment, it became evident that the central issue revolved around whether there was a breach of contract by the respondent in failing to deliver 150 bags of maize to the appellant, valued at Tshs. 10,075,000/=. He further contended that the appellant had presented bank statements for the payment of the maize price, which were admitted by the trial magistrate and acknowledged by the respondent. He asserted that the crux of the matter was whether the respondent indeed breached the contract by not delivering the agreed-upon maize to the appellant.

He informed the court that instead of addressing whether the 150 bags of maize were delivered, the respondent delved into discussions about a previous consignment of 160 bags which was

not pertinent to the dispute at hand. He highlighted that the respondent even introduced bank statements for other transactions unrelated to the subject matter. He argued that the focal point remained that the respondent had received payment for purchasing maize but failed to fulfil the delivery obligation, purportedly fleeing to unknown locations. Moreover, he questioned how the respondent could have delivered the maize while allegedly in Dar es Salaam for medical treatment, as claimed during the trial.

He further contended that during cross-examination, the respondent failed to provide proof of delivering the maize and did not summon the purported driver who allegedly loaded the maize for delivery to the appellant. Additionally, he emphasised that neither the vehicle nor the truck used for loading the maize was mentioned. He asserted that both the trial court and the appellant court were misled by the emphasis on the 160 bags instead of focusing on the claim of 150 bags to establish the basis of the dispute, leading to an erroneous conclusion. He argued that despite the acknowledgement by the lower courts that the appellant had indeed paid for the maize, they erroneously denied the existence of a contractual agreement.

Arguing the third ground of appeal, he reiterated to the court that the appellate court rightfully identified the shortcomings of the trial court in evaluating evidence, as documented on pages 29 and 30 of the appellate court's judgment. He emphasized that the rationale provided by the appellate court contradicts the final decision, as evidenced by the excerpt stating, *"I find no need to labour much resolving the second ground of the appeal as the claim of the appellant in respect of 155 maize sacks has never been established, meaning that such agreement never existed between the parties. Thus, the appeal is hereby dismissed entirely with costs."* He pointed out to the court that the conclusion on page 38 contradicts the reasoning outlined in pages 29 and 30. He argued that if the evidence was not properly evaluated, the appropriate course of action would have been to annul the decision and remit the matter to the trial magistrate for retrial, rather than dismissing it outright.

On the fourth ground, Mr. Ndunguru asserted that the appellant presented evidence to substantiate the payment of money to the respondent, which included bank statements demonstrating two initial instalments: Tshs. 5,000,000/= on 24.4.2022 and Tshs.

3,000,000/= on 28.4.2022, along with an additional Tshs. 2,075,000/= received in cash at Kwediboma. He further emphasized that all payments provided by the appellant regarding the purchase of the disputed maize were not refuted by the respondent. According to him, this implies that there was an agreement between the two parties for the purchase of maize, and the payments were undisputed regardless of the quantity of maize. He informed the court that despite the respondent acknowledging the receipt of the money, both the trial and appellate courts disregarded the evidence, as evidenced on page 38. He argued that the failure to consider the appellant's evidence resulted in a miscarriage of justice. To bolster his argument, he cited the case of **Omary Abdallah Kilua v Joseph Rashid Mtunguja**, Civil Appeal No. 178 of 2019 (Unreported).

On the fifth ground of the appeal, he contended that the acknowledgement by the defendant, as evidenced by exhibit AGK1, a bank statement, demonstrates the existence of a contract between the two parties. He further argued that the magistrate failed to properly evaluate the evidence when concluding that the appellant had not established the existence of an agreement to

purchase 155 bags of maize. He maintained that the crux of the matter was the agreement to purchase maize and the subsequent breach of contract by the respondent due to their failure to deliver the agreed-upon maize.

Arguing on the sixth ground of the appeal, he emphasized that the burden of proof in civil cases rests on the balance of probability. He pointed out to the court that the rules of evidence in the Primary Court stipulate that, in civil cases, the court is not required to be convinced beyond a reasonable doubt. He argued that the appellant had sufficiently demonstrated the existence of an agreement to purchase 155 bags of maize and had made payments in three instalments. He stressed that the agreement was oral, and based on the balance of probability, it should have been considered adequate evidence. He further contended that the trial court erred in disqualifying the appellant's evidence simply because the price of each bag of maize was not mentioned. Additionally, he criticized the trial court's dismissal of the testimony of the appellant's witness, Sabrina Swai (SM2) because SM2 could not recall the date of the payment of Tshs. 2,075,000/= was made to the respondent. He

argued that, in a civil case, the specific date was not as crucial as remembering the amount paid.

He stressed that the appellate court, on page 17 of its judgment, also discredited SM1's testimony for not stating the value of each bag, which he deemed a misconception of the burden of proof in civil cases. He reiterated that in civil cases, proof beyond a reasonable doubt was not required, and it was sufficient to rely on the appellant's statements regarding the payment of money to the respondent, supported by the produced bank statements. He urged the court to allow the appeal, nullify the judgment of the Kilindi District Court, and order a retrial of the case by the trial court to rectify the errors in the judgment.

Responding to the appellant's written submissions, Mr. Mohamed addressed the first, third, and fifth grounds collectively. He contended that the honourable magistrate at the appellate court had indeed acknowledged the weaknesses in the trial court's analysis, as quoted by the appellant. However, he argued that the court had appropriately reassessed and re-evaluated the evidence in its entirety during the first appeal. Consequently, the appellate court

concluded that the appellant had failed to substantiate his claim to the standard required by the law.

Mr. Mohamed continued by asserting that during the first appeal, the court meticulously reassessed and re-evaluated all the evidence presented during the trial court proceedings, concluding while exercising the powers vested by the law. He supported his argument by referencing the case of **Kaimu Said v Republic**, Criminal Appeal No. 391 of 2019, which cited the case of **Joseph Athanazi v Makene Musimu**, PC, Civil Appeal No. 04 of 2023 HC (Unreported).

He continued to argue that the first appellate court meticulously elucidated the reasons for its conclusions on all issues. Among these reasons, he pointed out one noted on page 33, paragraph 3 of the judgment, where he quoted:

"I find the evidence by the appellant that the agreement entered was for buying 155 maize sacks at the tune of Tshs. 10,075,000/= cannot stand. I am of this view because his evidence as supported by SM2 Sabrina Swai has failed to prove that such an amount was paid by cash to the respondent as opposed to the strong evidence showing that the mode of payment was through the bank

as supported by the bank statements exhibit AJK-1 and AJM-1"

He asserted that the court's reasons did not contradict any conclusions or stand-alone, as suggested by the appellant in his submission on the third ground of appeal. Furthermore, he argued that what was quoted by the appellant was merely an excerpt from the honourable magistrate's note regarding the weaknesses in the trial court's analysis and the final determination. However, he pointed out that the appellant failed to include a significant portion of the magistrate's reassessment and re-evaluation of the entire evidence. He emphasized that the appellant neither demonstrated the extent of evidence and reasons contradicting each other nor explained the level of contradiction.

Submitting on the second and fourth grounds of appeal, he argued that the respondent's submissions during the first appeal, as well as the evidence presented during the trial court proceedings, effectively countered all issues raised by the appellant at all levels. He further contended that the respondent had properly presented evidence, which was duly considered by the trial court and re-evaluated by the first appellate court, leading to the conclusion that

the appellant failed to substantiate his claim to the required standard.

He asserted that the appellant attempted to utilize this forum to rehash factual issues that had already been determined. Given that this was the second appeal, he argued that such issues could only be revisited if there were evident misdirections or omissions on the part of the first appellate court. To support this assertion, he cited the case of **Menald Wenela v The Director of Public Prosecution**, Criminal Appeal No. 336 of 2018 CAT (Unreported).

Regarding the sixth ground of appeal, the respondent argued that the appellant could not be deemed to have proven the case on the balance of probability merely by stating that there was an oral agreement with the respondent for the purchase of 155 bags of maize and that payments were made in three instalments. The respondent contended that the appellant failed to adequately prove the existence of such an agreement and the payments made, including specific dates and the mode of payments.

He further contended that the appellant herein fell short of proving the case to the standard required by the law regarding the balance of probability, as highlighted in the case of **RE.H. and**

Others v (Minors) (Sexual abuse: Standard of Proof) (1996)

ALL ER, which was referenced in the case of **Scania Tanzania Limited v Gilbert Wilson Mapande**, Commercial Case No. 31 of 2029 HC (Unreported), where it was held that:

"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not".

Lastly, he asserted that the first, second, third, and fourth grounds submitted by the appellant are new and were not raised in the initial appeal determined by the appellate court. Therefore, he argued that these grounds should not be considered by the second Appellate Court, citing the legal position as explained in the case of **Joseph Njasii v Republic**, Criminal Appeal No. 330 of 2026, where it was held on page 6 of the ruling, citing the case of **Menald Wenela v The Director of Public Prosecution**, Criminal Appeal No. 336 of 2018 CAT (unreported), that a second appellate court cannot adjudicate on matters not raised as grounds of appeal in the first appellate court.

In conclusion, he prayed to the court to find this appeal lacking in merit and dismiss it with costs.

In rejoinder, Mr. Ndunguru contested the respondent's assertion that the appellate court adequately evaluated the appellant's evidence during the appeal stage. He deemed this argument invalid, emphasizing that the failure to properly assess the evidence nullified the judgment of the trial court, rendering it essentially meaningless. He argued that a judgment lacking proper evaluation of evidence holds no legal weight and should result in a retrial. To reinforce his stance, he once again cited the case of **Omary Abdallah Kilua** (supra), where the Court of Appeal highlighted weaknesses in a judgment due to the failure to evaluate witness evidence, held that:

"We have no hesitation to hold that, the learned chairperson strayed into error when he ignored the evidence of other witnesses in composing the judgment. He did not apply his mind to the testimonies of all witnesses so as to reach at a just decision. Before the eye of the law, the purported judgment did not meet the test of being a judgment".

He contended that, according to the case cited, the Court of Appeal emphasized that, in the eyes of the law, the purported judgment failed to meet the criteria of being considered a judgment. Consequently, he argued that the judgment of the

primary court in this case falls into the same category of judgments and should have been nullified accordingly.

He continued by arguing that the portion quoted by the respondent in their submission, which they contend to be an evaluation of the appellant's evidence, cannot rectify the defect of the trial court judgment. He asserted that this excerpt does not even qualify as an evaluation of the appellant's evidence. The trial court should have weighed the evidence presented by the appellant against that of the respondent to determine why the appellant's evidence was disregarded while the respondent's was accepted.

He submitted that both the trial court and the appellate court failed to perform this crucial task, as evidenced by the absence of any mention of the exhibits submitted by the appellant during the trial in the judgment. Conversely, the court noted the bank statement submitted by the respondent as part of their evidence. In essence, he argued that the failure to properly weigh the evidence led to an incomplete and defective judgment at both the trial and appellate levels.

Regarding the proof of the existence of the contract, he reiterated that the appellant had indeed demonstrated the existence

of the contract and had provided bank statements to illustrate that payments were made. He pointed out that the respondent acknowledged receiving money from the appellant for the purchase of maize. Thus, he argued that the question at hand was not whether such a contract existed, but rather whether the contract was breached due to the non-delivery of maize by the respondent.

He maintained his stance and urged the court to allow this appeal. Furthermore, he requested the court to nullify the judgment of the district court and order a retrial of the case by the trial court.

After reviewing the records and submissions from both parties, the key issue for determination is whether the appeal has merit.

In his submission, Mr. Mohamed, representing the respondent, raised a crucial point regarding the grounds of appeal. He argued that the first, second, third, and fourth grounds of appeal were not previously raised or determined by the first appellate court, and thus, he urged this court not to consider them. Upon careful review of the record, I am persuaded that the first, second, and third grounds of appeal indeed constitute new issues not addressed in the first appellate court. It is well-established in legal jurisprudence

that a second appellate court should refrain from adjudicating on matters that were not presented as grounds of appeal in the first instance, save for grounds involving points of law. This principle finds support in the precedent outlined in the case of **Joseph Nyasii v Republic**, Criminal Appeal No. 330 of 2016 CAT (unreported). Consequently, in adherence to this legal doctrine, this court will not entertain the first three grounds of appeal.

Coming to the remained grounds of appeal, the appellant's fourth ground of appeal concerns the alleged failure of the trial magistrate to consider his evidence. He emphasized that despite his evidence of payment to the respondent, which was unrefuted by the respondent, both the trial and appellate courts dismissed his evidence. The respondent countered, asserting that his evidence was indeed considered and re-evaluated by the first appellate court, which concluded that the appellant failed to substantiate his claim. Upon review of the record, particularly the District Court's judgment on pages 31 to 39, it is evident that the District Court thoroughly re-evaluated the appellant's evidence and found it lacking. This conclusion was drawn from the testimony of two witnesses presented by the appellant. PW1 testified to have made two bank

payments and a cash payment totalling Tshs. 10,075,000/= which was aimed at the supply of 155 sacks of maize, while PW2 corroborated the cash payment. In defence, the respondent denied receipt of Tshs. 2,075,000/= but admitted receiving Tshs. 8,000,000/= deposited into his bank account for 160 sacks of maize which he had supplied to the appellant. The respondent contended that the mode of payment they had agreed was through bank payment. DW2 and DW3 supported the fact that 160 sacks were supplied to the appellant. The District Court was satisfied that, there mode of payment that the two had agreed on was through the bank and therefore found no proof of the payment being made through cash. From the above, it is evident that the District Court appropriately considered the appellant's evidence, leading to the conclusion that the appellant did not substantiate his case. Consequently, this ground of appeal is without merit.

The fifth and sixth grounds of appeal centre on the trial court's purported failure to adequately evaluate the appellant's evidence and its decision not to rule in favour of the appellant, despite the appellant having substantiated his case to the requisite standard. The appellant argued that the focal point of the fifth

ground revolved around the agreement for maize purchase and the subsequent breach of contract resulting from the respondent's failure to deliver the contracted sacks of maize. Conversely, in the sixth ground, the appellant emphasized the court's failure to render a judgment in his favour despite having met the necessary evidentiary standards. Conversely, the respondent argued that the appellant failed to substantiate the existence of such an agreement and the corresponding payments. Moreover, he had failed to prove the existence of the contract to the required standard.

It is important to highlight that the appellant's claim was for 155 sacks of maize, and three specific issues were delineated in guiding the court's deliberations and ultimately in reaching its decision. Firstly, whether the plaintiff/appellant entered into a contract to purchase 155 sacks of maize from the respondent. Secondly, whether the respondent breached the said contract. And thirdly, what reliefs are the parties entitled to?

Addressing the above issues, the District Court, acknowledged the trial court's failure to evaluate the evidence and assumed that responsibility as the first appellate court. It meticulously scrutinized the evidence spanning pages 32 to 38 to ensure a thorough

examination of the case. Upon re-evaluation, the District Court noted that the appellant's evidence did not establish a cash payment of Tshs. 2,075,000/= to the respondent. However, evidence of two bank payments totalling Tshs. 8,000,000/=, to the supply of 160 sacks of maize, was evident. Consequently, the District Court concluded that the purported agreement for the purchase of 155 sacks of maize at Tshs. 10,075,000/= could not be upheld. Instead, it was determined that the parties had a contract for the supply of 160 sacks of maize, which were delivered to the appellant.

It is settled that in civil cases, the court will decide the case in favour of the party whose evidence bears greater weight than the weight of the evidence of the other: Regulation 6 of the Magistrates' Court (Rules of Evidence in Primary Courts) Regulations, GN Nos. 22 of 1964 and 66 of 1972. Upon review of the evidence, it is clear that the appellant's evidence carried no heavier weight compared to the respondent's evidence. The evidence in the record demonstrates that Tshs. 8,000,000/= was deposited into the respondent's bank account as corroborated by a bank statement (Exhibit AJM - 1), and the testimony of the

respondent's witnesses (DW1 and DW2) confirming the delivery of 160 sacks of maize. However, doubts linger regarding the alleged Tshs. 2,075,000/= payment to the respondent. PW2 was not even in a position to state when this money was given to the respondent and whether or not the maize was supplied to the appellant.

Therefore, the matter was thoroughly re-evaluated by the District Court, leading to the correct determination. It is concluded that the appellant failed to provide sufficient evidence to establish the existence of a contract between the parties for the supply of 155 sacks of maize, as claimed by the appellant and total to establish his case to the required standards. Consequently, the fifth and sixth grounds of appeal lack merit and are dismissed.

In the end, the appeal is hereby dismissed with costs.

It is so ordered.

DATED at TANGA this 17th of April 2024




H. P. Ndesamburo

JUDGE