

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

**DAR ES SALAAM DISTRICT REGISTRY**

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 31 OF 2023**

*(Arising from the judgment of the Bagamoyo District Court originating from Kerege  
Primary court Civil Case No 31 of 2022)*

**JIDA HAMIS UKU..... APPELLANT**

**VERSUS**

**LEONARD LUKAS LUTANA ..... RESPONDENT**

**JUDGMENT**

**MKWIZU J:**

The Respondent in this appeal had in 2020 approached the appellant for the supply of a motorcycle which he was to run for gain and return to the appellant a total sum of 70,000/= per week for a year from 20th October 2020 to 20th October 2021. It seems the contract was executed to the end despite clashes between the parties that came to light during the trial. The disagreement came upon the appellant's refusal to hand over the respondent a motorcycle card as agreed after he had accomplished remitting the agreed sum alleging breach of the contract. Parties could not resolve their differences resulting in the filing of a civil suit at Kerege primary court ( civil case No 31 of 2022) by the respondent herein claiming the motorcycle registration card and 210,000 cash as a total sum paid to the appellant over the agreed contractual sum.

At the end of the trial, the Respondent was ordered to pay the Appellant Jida Hamis UKU a total sum of 210,000 within 30 days and the Appellant was to hand over the Motorcycle Registration card to the Respondent in exchange thereof. Unsuccessfully, the appellant, Jida Hamis Uku, appealed to the District Court with a total of four grounds of appeal. Still aggrieved, she has appealed to this court with six grounds of appeal faulting the 1st appellate court for:-

1. *Failure to consider the nature of the contract between the parties.*
2. *Ordering the plaintiff to hand over the motorcycle and the card after the respondent has failed to prove his allegation.*
3. *Failure to observe that the respondent is the one who breached the contract.*
4. *Improper interpretation of a new issue raised by the trial court resulting in an erroneous decision.*
5. *Failure to consider the strong evidence adduced by the appellant and*
6. *For reaching its decision contrary to the law.*

The appeal was ordered to be disposed of through written submissions and a schedule was set for the filling of the required written submissions. Unfortunately, it is the appellant who complied with the order. Respondent did not file any document hence this ex-parte judgment against the respondent.

Explaining her first ground of appeal, the appellant submitted that the parties were contractually bound to honor their contractual obligation and that the respondent's failure to fulfill his obligation under the contract amounted to a breach of contract. She on this point referred the Court to

the case of **Kichele Chacha V Aveline M. Kilawe**, Civil Appeal No. 160 of 2018, (Unreported).

Counting on the principle of the onus of proof in civil cases in explaining the second ground of appeal, the appellant was of the view that having failed to establish his claim, the respondent's claim ought to have been rejected. She blamed the trial court for ordering her to hand over the motorcycle and the card to the respondent even after its conclusion that he failed to establish his allegation.

Capitalizing on the breach of contract, the appellant on the third ground blames the 1st appellate court for failure to observe that the respondent was the one who breached the contract criticizing the 1st appellate court for failure to consider her strong defence evidence. She was of the view that the two courts below had relied on the contradictory and inconsistent evidence by the respondent disregarding her strong defence. She lastly invited this court to quash and set aside the 1st appellate court's decision.

I have considered the grounds of appeal, the records of the appeal, and the submissions by the appellant. The appellant has brought to this second appeal new grounds of appeal which were not raised and determined by the 1st appellate court. Times without number, the Court of Appeal has restated its position restricting that the 2nd appellate court has no jurisdiction to entertain new grounds not determined by the first appellate court. See for instance **Hassan Bundala @ Swaga v. Republic**, Criminal Appeal No. 416 of 2013, **Samwel Sawe v. Republic**, Criminal Appeal No. 135 of 2004, and **Godfrey Wilson v. Republic**, Criminal Appeal No. 165 10 of 2018 (all unreported) to mention just a few. In **Samwel Sawe v. Republic**, (Supra) the court held :

*"As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the second appellate court..."*

And in **Julius Josephat** (supra), it was stated that:

*"... As often stated, where such is the case, unless the new ground is based on a point of law, the Court will not determine such ground for lack of jurisdiction. "*

At the 1st appellant court only for issues were submitted, argued, and decided upon. None of them covered the issue now raised on grounds 1,3 and 4 of the appellants' petition of appeal. And looking at them closely, these three grounds are not legal points to align them to this appeal. This court therefore lacks jurisdiction to entertain the same. I will thus disregard them.

The 2nd, 5th, and 6th grounds of appeal are intertwined, they all challenge the evaluation of the evidence and the genuineness of the decision by the 1st appellate court after the conclusion that the respondent has failed to establish its case, I will therefore determine them together. But before I go to the actual analysis of these grounds I wish to restate here that, this being a civil case, the onus of establishing a case lies on the party who makes the assertion and the standard of proof is always on the balance of probability. This position is well articulated under sections 111, 112, and 115 of the Evidence Act, Cap 6 RE 2022.

*"111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side.*

*112. The **burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence** unless it is provided by law that the proof of that fact shall lie on any other person.*

*115. In civil proceedings **when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.**" (Emphasis supplied)*

In **Anthony M. Masanga v. Penina (Mama Mgesi) & Lucia (Mama Anna)**, CAT-Civil Appeal No. 118 of 2014 (unreported) citing with approval case of **RE B [2008] UKHL**, the Court of Appeal observed:

*"If a legal rule requires a fact to be proved (a fact in issue), a Judge or jury must decide whether or not it happened. There is no room for finding that it might have happened. **The law operates a binary system in which the only values are 0 and 1.** The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. **If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.**"*  
(bold is mine)



The decision of the court will always be grounded on the weight of evidence led by the parties. The Court must be satisfied that the story of the litigant upon whom the onus rests is true, and the other is false.

The dispute between the parties as explained stems from a one-year motorcycle business contract. There is no doubt that the two had agreed on the terms that required the respondent to run the motorcycle for a return of 70,000/= weekly to the Appellant for the period year after which he would acquire the ownership of the vehicle. It is from both parties' evidence that the contract was executed. The respondent's claim at the trial court was based on the refusal by the appellant to hand over the original card of the motorcycle and refund the 210,000 paid in excess at the end of the contract. The Appellant on the other hand faults the respondent for breach of the contract- not remitting the agreed weekly amount.

The evaluation of the evidence shows that the remittance was made to the appellant directly and sometimes through her sister and the guarantor. This evidence is supported by SM2 and the ten-cell leader who testified as SM3 and the defence evidence by DW1. PW3's evidence shows that there was a time the appellant complained to him about the respondent's failure to remit the agreed sum. But the issue was resolved, payments were made and there was no further complaint from the appellant until 20/10/2021 when she refused to hand over the motorcycle card as agreed claiming for 210,000 unremitted sum.

In her evidence, the appellant (SU1) admitted receiving money from the respondent directly and through the guarantor. Her evidence at page 17 and 18 of the records goes thus:

*...tulikubaliana kila wiki anatakiwa alete elfu sabini. Tulipokabidhiana ile pikipiki mimi nilisaini niliporudi mke wake alimletea laki moja na elfu arobaini, 140,000/=. Nipomuuliza mdai yupo wapi alisema kuna tatizo katika pikipiki hivyo elfu 10,000/= tumetoa. Hivyo alitaka tuchangiane, nikamwambia siwezi kuchangia. **Baadaye wakawa wananipa sio kama inavyotakiwa.** Ilipopita kuda wa miezi miwili nikamwambia basi warudishe pikipiki **sikuwa na namba ya mdai katika form kuliukuwa na namba ya mdhamini wangu ambaye ni dada yangu.** Sikuwahi kumuona mdai. Tulienda serikali ya mtaa tukaonana na mke wa mdai. **Lakini wao waliendelea kutoa pesa kwa dada yangu. ... Dada yangu alisema kuna pesa zimetumwa ila hajui ni shilingi ngapi kwa kuwa kwa wakati huo nilikuwa je ya nchi.** Hivyo nilimtaka yule mama aje tupige mahesabu. Baada ya muda kupita mdai alinipigia simyu kuwa mkataba umeisha. Hivyo alitaka kadi yay a pikipiki. **Nikamwambia siwezi kukupa kadi kwa kuwa umevunja mkataba...**"*

In this passage, the appellant admits receiving money from the respondent directly and through her sister. She acknowledges the fact that she complained about her payment to the ten-cel leader ( Sm3) and the matter was solved and it is vivid that she did not complain to anyone until when the motorcycle card was requested by the respondent.

Interestingly, the reason for the refusal to hand over the card, which she gave in evidence was a breach of contract. The important question is

whether the respondent breached the contract. Looking at the defence evidence, nothing was said about the alleged breach. What is clear from the evidence from both parties is that the respondent kept on remitting the required amount to the end of the contract even when the appellant was outside the country. Even assuming that the non-remittance reported to the SM3 three months after the contract amounted to a breach, that breach was rectified by the appellant conduct who accepted the payment afterward. This is reflected in her evidence during cross-examination where she acknowledged receipt of 1,170,000/=, 260,000, 110,000, and 80,000/=

A general evaluation of evidence has failed to establish a breach of contract by the respondent. I find the respondent's evidence heavier than that of the appellant except for the payment is excess that remained unproved. It is the findings of this court also that the order for payment of 210,000 by the respondent to the appellant issued by the trial court and upheld by the 1st appellate court is not supported by evidence. It is thus quashed and set aside. The appeal is thus partly allowed as explained above.

For the avoidance of doubt, the appellant is required to hand over the motorcycle and the card to the respondent as directed by the two courts below. Order accordingly.

Dated at Dar es salaam, this 2<sup>nd</sup> Day of February 2024



**E.Y. MKWIZU**

**JUDGE**

**2/02/2024**

COURT: Right of Appeal explained





**E.Y. MKWIZU**

**JUDGE**

**2/02/2024**