IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TANGA SUB REGISTRY

AT TANGA

CIVIL APPEAL NO. 09 OF 2023

(Arising from Civil Case No. 03 of 2022 of the District Court of Korogwe at Korogwe)

ETC AGRO TRACTORS & IMPLEMENTS LIMITED ..... APPELLANT

VERSUS

ELIA MBAZI KISIMBO ..... RESPONDENT

JUDGMENT

14/03/2024 & 31/05/2024

The respondent successfully initiated Civil Case No. 03 of 2022 in the District Court of Korogwe at Korogwe against the appellant, who acted as the defendant during the trial. The respondent sought damages for losses incurred due to the purchase of a substandard trailer supplied by the appellant.

Based on the record, the following are the brief facts of the case: In April 2021, the respondent entered into a contract with the appellant to purchase a trailer for Tshs. 18,000,000/=, which was

subsequently registered as T 981 DVQ. The trailer commenced operations on the 20th of April 2021 but experienced a breakdown on the 25th of June 2021. The respondent promptly informed the appellant of the breakdown, and minor repairs were carried out by the appellant. However, despite these repairs, the trailer failed to function properly. The respondent repeatedly requested the appellant to repair the trailer, but these requests were unacted upon. Consequently, the respondent filed a civil suit before the District Court for the claim of damages.

At the District Court, four issues were framed for the determination of the matter. These were as follows:

i. *Whether the trailer which the defendant sold to the plaintiff was below standard.*

ii. *If (i) is in the affirmative, whether the act of the defendant to sell the trailer to the plaintiff which is below the standard caused a loss to the plaintiff.*

iii. *Whether the defendant incurred 2,500,000/= being costs for repair of the trailer.*

iv. *What relief are the parties entitled to?*

Following the proceedings and hearing from both parties, the trial court concluded that the trailer sold by the appellant to the respondent did not conform with the contract and therefore was below the standard resulting in the respondent suffering damages. The trial court thereby awarded the respondent Tshs. 18,000,000/= being special damages, Tshs. 50,000,000/ as general damages, interest and costs.

The appellant, dissatisfied with the trial court's decision, now stands before this court, appealing on eight grounds. However, during the submission, the appellant abandoned the 8th ground. The remaining grounds are as follows:

1. *The trial magistrate erred in fact and law to hold that the agreement between the appellant and the respondent specified the volume capacity of the trailer but did not specify its weight.*
2. *The trial magistrate erred in fact and law to hold that the respondent directed the appellant that the trailer was going to be used for carrying sisal in Korogwe District hence the trailer ought to have been made to suit such purpose.*

3. *The trial magistrate erred in fact and law to hold that it was impossible for the respondent to measure the sisal leaves before it is transferred to the factory.*

4. *The trial magistrate erred in fact and law to assume the position of the respondent's witness.*

5. *The trial magistrate erred in fact and law to reject the contention of the appellant's witness that the respondent examined the trailer and found it to be of good standard otherwise he would have rejected it.*

6. *The trial magistrate erred in fact and law to hold that to rely on the modification made by the appellant's mechanic (DW3) to justify the allegation that the trailer was of a lower standard.*

7. *The trial magistrate erred in fact and law to order that the property remains the property of the plaintiff.*

By consent, the appeal was argued by way of a written submission. The appellant was represented by Mr. Symphorian Revelian Kitare, a learned counsel, whereas the respondent had the service of Ms. Ernesta Chuwa, also a learned counsel.

In ground number one, the appellant is complaining over the decision of the trial court, which determined that the agreement

between the parties regarding the sale of the trailer specified its volume capacity rather than its weight capacity, as indicated on page 16 of the judgment. Mr. Kitare disputed this claim by arguing that the parties did not agree on the volume of the trailer. Furthermore, even if such an agreement existed, the same was not an issue which was determined during the trial.

He also argued that even if there was no written agreement regarding the weight of the trailer, it could still be established through documentary evidence, such as Exhibit D2, a letter from the NMB Bank to the Tanzania Revenue Authority (TRA) requesting the trailer's registration under the respondent's name. Counsel emphasized that Exhibit D2 clearly stated the weight capacity of the trailer as 10 tons. In addition, PW1 admitted that the trailer was capable of carrying 10 tons.

In the second ground, the appellant challenges the trial court's reliance on section 16(a) of the Sale of Goods Act, 2002, and a precedent set by this court in the case of **Dp Shapriya & Co. Ltd v Gulf Concrete and Cement Product Co. Ltd**, Commercial Case

No. 23 of 2015. This precedent emphasizes that if the buyer communicates to the seller the specific purpose for which the goods are required, there is an implied condition that the goods will be fit for that purpose. The appellant argued that they adhered to the principles established by the aforementioned authorities. The appellant insisted that the supplied trailer met the description provided by the respondent, which was to transport sisal from the farm to the factory in Korogwe District. According to the appellant, no other specifications were communicated for the trailer.

The appellant further, blamed the respondent for using the trailer for purposes other than those specified, such as transporting four staff members, as evidenced on page 33 of the proceedings.

In the third ground, the appellant contests the trial court's decision regarding the feasibility of measuring sisal leaves before transfer. The appellant's counsel argued that the respondent's lack of awareness regarding the importance of measuring the weight of sisal leaves before loading them onto the trailer should not serve as an excuse for overloading the trailer. Despite the absence of a

weighing scale, the appellant's counsel contended that the respondent should have been able to estimate the weight of the sisal leaves based on their size. This argument was supported by the testimony of DW3, an agricultural engineer, who stated that the weight of sisal leaves could be approximated based on their size. DW3 further testified that the trailer was being overloaded. The appellant's counsel concluded by asserting that the sisal leaves loaded onto the trailer exceeded the trailer's capacity of 10 tons.

In the fourth ground, the appellant raises a complaint against the conduct of the trial magistrate, alleging that she assumed the position of the respondent's witnesses. The appellant's counsel pointed out several instances in the judgment where the trial magistrate appeared to take on the perspective of the respondent.

Ground number five challenges the trial magistrate's decision to dismiss the appellant's evidence regarding the respondent's inspection of the trailer, as testified by DW1. The appellant argues that the respondent had sufficient time to inspect the trailer, which he did and even brought a mechanic who confirmed its good quality

after a thorough examination. The appellant backs her assertion with the provision of section 36(1) of the Sales of Goods Act, 2002, which prohibits the buyer from rejecting goods after inspection. The appellant further, denies any claims of latent defects in the trailer and suggests that its collapse was due to overloading, evidenced by its bending.

Ground number six contests the trial magistrate's reliance on modifications made by DW3 to support the claim of the trailer's low standard. The appellant argues that these modifications were not part of the sale contract but were made out of goodwill, and thus should not be used to justify allegations regarding the trailer's quality.

The seventh and final ground of appeal pertains to the trial magistrate's decision to allow the respondent to retain the trailer. The appellant's counsel contends that since the trailer was not tendered in court as an exhibit, and considering that the respondent was awarded Tshs. 15,000,000/= in damages, he should not have been permitted to keep the trailer.

From the above, the appellant's counsel urges this court to grant the appeal, set aside the judgment and decree, and award costs accordingly.

In response to the first ground, the respondent argued that the appellant's submission was a misconception and Exhibit D2 and P4 are not agreement and cannot be construed to mean agreed terms of the contract. She argued that the learned trial magistrate was justified in her decision to hold that the agreement between the parties expressly specified the volume capacity and purpose of the trailer. She added that the trailer was intended to be suitable for carrying sisal and therefore was expected to be made to fit that purpose. Moreover, the respondent asserted that the provided trailer adhered to the dimensions specified by him, which in turn determined its weight capacity. By filling the trailer to its intended level, the respondent claimed compliance with the required weight limits. Additionally, the respondent contended that the appellant failed to provide evidence demonstrating that they exceeded the

stipulated weight limit. Instead, they argued that the trailer was constructed using weak and rotten materials.

In response to the second ground, the respondent contends that he explicitly communicated to the appellant his intention to use the trailer for transporting sisal leaves from the farms to the industry. Consequently, the respondent argues that there existed an implied condition that the trailer would be reasonably suitable for such a purpose. It is his position that the appellant violated this condition by providing a trailer that fell short of the required standards and was unfit for its intended use.

Contrary to the appellant's claim that the trailer was overloaded and utilized for transporting individuals, including the respondent's workers, the respondent argued that there is a lack of substantiating evidence.

Furthermore, there is no documentation to support the assertion that the respondent exceeded the trailer's 10-ton capacity.

Regarding the third ground, the appellant challenged the testimony of DW2 on the basis that he did not witness the collapse

of the trailer or the sisal leaves carried on the trailer when it collapsed. Instead, the appellant argues that DW2 only appeared before the trial court with a sample of sisal leaves and attempted to deliver a lecture rather than giving substantive evidence. Furthermore, the appellant contends that the testimony of DW2 amounted to nothing more than an academic exercise. The assertion that the trailer was overloaded, according to the appellant, was merely speculative and lacked concrete evidence to support it.

As for the fourth ground, the respondent rebuts the appellant's claim that the learned trial magistrate took on the role of the respondent. Instead, the respondent asserts that the learned magistrate was merely expressing the court's observations made during the visit to the *locus in quo*, citing precedents such as the case of **William Mukasa v Uganda** [1964] EA 698, among others.

Regarding the fifth ground, the respondent refuted the claim of being afforded sufficient time to inspect the trailer. He contested the appellant's assertion that he had examined the trailer and

deemed it to be of satisfactory standard, dismissing it as unsubstantiated and an afterthought.

Furthermore, the respondent argued that Section 36(1) of Cap 214 does not apply to the present case, as the single day provided for inspection was insufficient. Additionally, he pointed out that DW3, who constructed the trailer, was not certified by SIDO, TBS, and TRA at the time of trailer construction.

In regards to the sixth ground, the respondent maintained that despite the modifications and repairs carried out by DW3, the trailer still collapsed. Additionally, the respondent argued that these modifications were related to the contractual agreements between the two parties.

On the seventh ground, the respondent asserts that the trial court appropriately ruled that the trailer remains in the possession of the respondent. This decision was made considering the absence of a counterclaim by the appellant and the fact that the trailer is still under the ownership of NMB Bank, as the loan extended to the respondent has yet to be settled.

Based on the arguments presented above, the respondent urges this court to dismiss the appellant's appeal and award costs accordingly.

In rejoinder, Mr. Kitale argued that the respondent's assertion of unawareness regarding the trailer's designated weight of 10 tons, as evidenced by exhibits D2 and P4, is unsubstantiated. He pointed out that these documents were provided to the respondent before the trailer's purchase. Additionally, he contested the respondent's claim of compliance with the trailer's weight capacity, stating that the respondent's argument, that because the trailer bent when loaded to its full capacity, it was not designed for 10 tons, is flawed. Mr. Kitale argued that even if this assertion were true, it does not prove that the respondent did not exceed the trailer's weight limit.

Furthermore, Mr. Kitale refuted the notion that the trailer's volume capacity determines its weight-carrying capacity, deeming it unrealistic. He highlighted potential discrepancies arising from changes in the size and weight of the sisal leaves due to weather variations, rendering such an unqualified measurement unreliable.

Consequently, he urged disregarding such measurements, especially when the specified weight limit for the trailer was exceeded, as admitted by the respondent.

Reverting to the second ground of appeal, he asserted that the trailer collapsed several times and was repaired in several parts because the respondent overloaded it.

He went on to submit it was testified in court that the trailer carried 4 people, and the statement that 2 persons were carried on the tractor was not testified in court. He added that the submissions that the respondent submits the trailer was supposed to have a capacity of carrying 2 workers amounts to specification which the buyer ought to have informed the seller before he purchased it.

Mr. Kitare further submitted the respondent was supposed to raise his contention that the appellant tendered no evidence to prove that the respondent exceeded 10 tons before the trial court. He asserts that the fact that was admitted in court to have exceeded 10 tons makes this evidence superior to the documentary evidence demanded by the respondent. On this, he cited the case of **Maria**

Ngoda v Republic, Criminal Case No. 37116 of 2023 HC (unreported), where it was held that the testimony made in court overrides other testimonies.

Rejoining to the third ground, the learned counsel contends that the DW2's testimony was not challenged at the trial court, therefore, it stands and cannot be challenged at the appeal court. He further submits that the respondent supports his submissions by relying on DW2's evidence, who testified that sisal is not measured in farms as there are no weighbridges. However, the appellant submits that this cannot be an excuse to overload the trailer, arguing that the trailer owner is not prevented from measuring his sisal leaves by using other means.

Answering the fourth ground, he submitted that while the trial magistrate was right to give her observation after she visited the locus in quo, he disputes how the observation was presented. To support his submission, he cited the case of **William Mukasa v Uganda**, emphasizing that after visiting the *locus in quo*, the magistrate should exercise great care not to constitute herself a

witness, aligning with the respondent's argument in these submissions. He also cited the case of **Nizar Ladak v Gulamal Janmohamed**, [1980] T.L.R 29 where the courts were cautioned to conduct the *locus in quo* properly to establish whether the evidence regarding the property corresponds with its physical appearance and that the visit is not to fill gaps in evidence.

Alternatively, he argued that the trial magistrate ought to have raised her observation in court to afford an opportunity for the appellant to reply, rather than including her observation during the composition of the judgment.

In response to the fifth ground, he contended that the respondent's assertion that they examined the trailer and found it to be of good standard was unsubstantiated. However, the appellant submits that since the testimony was unchallenged during the trial, it cannot be contested in this appeal. Furthermore, he argued that aside from the fact that the respondent denied any defect when he received the trailer and acknowledged on the delivery note (D1) that it was received in good order and condition, the fact that the

respondent had possession of the trailer for two months until its collapse suggests that he had sufficient time to examine it. The appellant emphasized that the lack of reporting any defects during this period means that any issues arising after two months cannot be attributed to the appellant.

Additionally, the respondent challenges DW3's testimony that he was not certified by SIDO, TBS, and TRA when the trailer was manufactured, the appellant replies that this contention should have been raised during the trial, not on appeal.

In regards to the sixth ground, he averred that the repairs made do not substantiate that the trailer was below standard, but rather indicate that the trailer was misused.

Responding to ground seven, he argued that the appellant did not counterclaim because the trailer is the property of NMB, as the respondent has not finished repaying the loan advanced to him by NMB. He explained that the appellant had no reason to counterclaim since they had no interest in the trailer, as their interest had been transferred to the respondent when NMB paid the selling price. He

argued that the assertion that the trailer is the property of NMB is misleading, especially since the trial court ordered, among other things, the appellant to repay the selling price of the trailer to the respondent, which the respondent can use to repay the NMB loan. He contended that such an order to repay the selling price is unjust to the appellant.

Having examined the record of appeal and the submissions presented, the central focus of the appeal hinges on a critical question: was there sufficient evidence to demonstrate that the supplied trailer failed to meet the agreed standards? Addressing this fundamental question, which centres on this appeal, will automatically answer grounds 1,2,3,5, 6 and 7 of the appeal.

As a first appellate court, it is incumbent upon this court to reassess and reevaluate the evidence presented in the trial court and form its conclusions. This court acknowledges that did not have the opportunity to directly observe or hear the witnesses during their testimonies and should therefore make allowances for this limitation. Nevertheless, this court is not obliged to blindly adhere to the factual

findings of the trial court if it becomes evident that it overlooked significant circumstances or probabilities pertinent to the evidence at hand. This principle is underscored in legal precedents such as **Selle & Another v Associated Motor Boat Company Ltd & Others** 1968 E.A 123, **Peters v Sunday Post Ltd 1958 E.A 424,** and **Okenu v R** 1972 E.A 32, among others.

It is undisputed that at an unspecified date in April 2021, the parties entered into an agreement wherein the respondent would purchase a trailer from the appellant for Tshs. 18,000,000/=, inclusive of VAT, for use in his sisal business. The method of purchase involved a loan from NMB bank, which would become effective upon the respondent's signing of the delivery note, indicating acceptance of the trailer. This arrangement ensured that the bank would release the funds as payment to the appellant. Thus, the trailer served as collateral for the respondent to secure it for his business needs.

It is undisputed that the respondent took possession of the trailer on the 17th of April 2021, but on the 25th of June 2021, it

malfunctioned. Although the appellant repaired it within a few weeks, it subsequently broke down again. The trial court concluded, based on the evidence presented, that the trailer was substandard. However, the appellant counter that the respondent overloaded the trailer and used it for purposes beyond its intended scope, such as transporting staff.

At this juncture, it is pertinent to ascertain the terms of the agreement between the parties before their establishment of a legal relationship. A fundamental principle of contract law dictates that parties are bound by the terms of agreements entered into voluntarily. This principle has been consistently emphasized in various legal precedents, including but not limited to cases such as **Simon Kichele Chacha v Aveline M. Kiwale**, Civil Appeal No.160 of 2018 CAT (Unreported).

Certainly, in this appeal the contract between the parties was oral, and based on the evidence presented during the trial, it does not appear that the contract was subject to any explicit conditions beyond a few terms concerning the trailer. During cross-examination

on page 32 of the proceedings, PW1 testified that he told the marketing manager of the appellant, Edward Mghamba to sell him a trailer of a certain volume to carry his sisal providing details regarding its length and width, tailored to accommodate the nature of sisal leaves. He further told the trial court that, at the offices of the appellant, there were small trailers which did not fit his demand. He therefore told the manager that he was in need of a trailer that was bigger than the one he saw at his office. He further proceeded to state that it was the manufacturer's responsibility to design the trailer to meet his demand and provide the weight that could safely carry. However, it is important to note that PW1 did not provide specific dimensions or volume requirements in his testimony at all.

It is a fundamental principle of law that, typically in civil cases, the burden of proof rests on the party making a claim or assertion. This principle forms the basis of the provisions outlined in section 110 of the Evidence Act, Cap 6, R.E 2022, which states as follows:

> *"110 (1) whoever desires any court to give judgment as to any legal right or liability depend*

on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence
of any fact, it is said that the burden of proof lies on that person.

Hence, in civil proceedings, a party who asserts a claim also carries the burden of presenting evidence and the standard of proof is based on the balance of probabilities. This principle is exemplified in cases such as **Paulina Samson Ndawavya v Theresia Thomas Madaha**, Civil Appeal No. 45 of 2027 CAT, and **Godfrey Sayi v Anna Siame as Legal Representative of the late Mary Mndolwa**, Civil Appeal No. 114 of 2012 CAT (both unreported).

Based on the legal principles and precedents cited above, this court hold that the burden of proof rested on the respondent since he alleged that the trailer was below standard. It is noted that respondent presented PW3, Kennedy Athanas Mwenda, a welder, to support this claim. PW3 testified to various deficiencies in the trailer, such as the thickness of the floor, the material used for the front

pillars, issues with the drawbar's dimensions, and the width of the chassis channel, all of which deviated from standard specifications.

However, the trial court primarily relied on the defects stated by PW3 in its judgment, as documented on page 19. To the assessment of this court, the trial court overlooked the need to corroborate the evidence both PW1 and PW3 provided to reach a comprehensive conclusion. PW1 had specified the desired dimensions and capacity of the trailer, which should have been considered alongside PW3's assessment. It appears PW3's testimony addressed general standards without accounting for the specifics outlined by PW1.

Moreover, PW3 did not comment on the weight of the trailer during the inspection, as PW1 asserted that it was the appellant's responsibility to ensure compliance with his specifications. Consequently, PW3's evidence cannot be relied upon, given the apparent lack of awareness regarding certain relevant facts stated by PW1.

I understand that the trial magistrate relied on section 16(a) of Cap 214, regarding implied conditions, suggesting that the appellant, being aware of the respondent's business, should have provided a standard trailer suitable for that purpose. However, considering the lack of clarity regarding the trailer's specifications, particularly its capacity, it remains uncertain whether the respondent's description aligns with the weight requirements.

If the respondent had provided precise details regarding the trailer's length, width, and capacity, it could have indicated that the appellant considered what was appropriate for the respondent's business. However, since the evidence from PW1 is deficient in terms of what was specifically suggested to the appellant, it is challenging to apply section 16(a) of Cap 214 in this context.

Furthermore, the appellant's assertion regarding the weight capacity of the trailer and the variable weight of sisal during different seasons, particularly in rainy conditions, complicates the determination of whether the trailer was below standard. Considering these factors, along with the lack of clarity regarding the

trailer's specifications, it is difficult to conclude that the trailer was of inferior quality.

Based on the aforementioned factors and arguments, this court inclined to agree that the respondent failed to prove his case on the balance of probabilities.

Regarding ground 4 of the appeal, the parties have contended that the court's visit to the area where the trailer was located equates to a visit in *locus in quo*. However, it is important to note that visits in *locus in quo* are typically reserved for immovable properties, such as land or buildings. While there may be exceptions where a visit to the site of an exhibit is relevant and beneficial for the court's understanding, in this case, the location of the trailer and its surroundings were not integral to the issues before the trial court to equate it to visit in *locus in quo*. Therefore, this court refrains from considering arguments regarding a visit to the *locus in quo*.

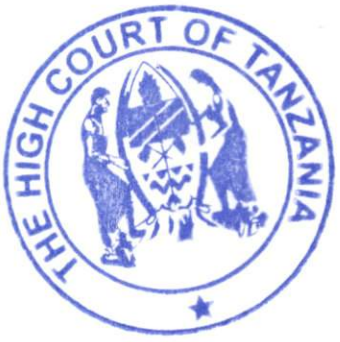
Nevertheless, this court concurs with the appellant's contention that it was erroneous for the trial magistrate to base her observation in the judgment on the absence of any indication of a 10-ton

capacity on the trailer as well as her remarks that neither the plaintiff nor his driver mentioned this detail. As argued by the appellant's counsel, it was necessary for the trial magistrate to have recorded her observations to the parties and allowed them to reply. Since this was not taken, her observations are disregarded by this appellate court. Therefore, the only evidence that remains valid is that provided by the parties themselves.

In conclusion, this court is satisfied that the respondent failed to prove his case to the required standards at the trial court. Therefore, the judgment of the trial court and subsequent orders are hereby quashed and set aside. Consequently, the appellant's appeal is deemed meritorious and is allowed with costs.

It is so ordered.

DATED at **TANGA** this 31st day of May 2024.



H. P. NDESAMBURO

JUDGE