IN THE HIGH OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB -REGISTRY OF MOSHI

AT MOSHI

CIVIL APPEAL NO. 11 OF 2023

(Appeal from a decision of District Court of Siha at Siha dated 25th May 2023 in Civil Appeal No 1 of 2022 originating from decision of Primary Court of Sanya Juu at Siha District dated 20th June 2022 in Civil Case No 2 of 2022)

ANOLD SALVATORY MARKO:.....APPELLANT

Versus

BENJAMIN GEOFREY TUNI:.....RESPONDENT

JUDGMENT

12th December 2023 & 29th February, 2024

A.P. KILIMI, J.:

The appellant herein sued the respondent at the Primary Court of Sanya Juu at Siha District claiming for payment of Tsh 4,470,000/= being the money arising from the respondent act of taking his car which carried the appellant's goods to wit crates of loaves, cakes, biscuits and an EFD machine. The trial court decided in favour of the appellant. The respondent being dissatisfied with the decision and orders thereto filed a Civil Appeal No. 01 of 2022 at the District Court of Siha on three grounds as follows;

1. That the trial court erred in fact and in law making decision in favour of the Respondent while the court had no jurisdiction in determining the matter.

2. That the trial court erred in fact and in law making decision in favour of the Respondent without considering that the Respondent failed to prove the case in a standard required by the law.

3. Thart the trial court erred in fact and law and misdirected herself thereafter give decision in favour of the Respondent who tendered fake/ contradictory and fabricated evidence and relied in unprocedural/ admission of Exhibit SMKl and without giving the Appellant right of challenging it through cross examination.

In its determination, the District Court considered Section 18(1)(iii) of the Magistrates' Courts Act CAP 11 R. E. 2019 and gauged the evidenced adduced in lieu of this provision, then decided that there was no contract between the appellant and the respondent, Thus, held the Primary Court had no jurisdiction to hear and determine the appellant matter, consequently proceeded to nullify the proceeding and quashed the trial court decision.

Aggrieved with the District Court findings, the appellant has preferred this appeal basing on the following six grounds;

1. That the Honorable Court erred in law and in fact for relaying on the issue which was not raised in the trial court or Court of first instance.
2. That the Honorable Court erred in law and fact by making decision against the appellant basing only on the evidence from the respondent herein and disregard the appellant's evidence.

3. In alternative to the 2nd ground, the Honorable Court erred in law and in fact for deciding that the matter fall under tort without consider the nature and evidence adduced by the appellant
4. That the Honorable Court erred in law and in fact for ruling out that there was no contract between the parties.
5. That the Honorable court erred in law and in fact by making a decision that Primary Court had no jurisdiction in determining the matter without consider the nature of the claim.
6. That the Honorable Court erred in law and in fact by deciding the appeal against the respondent while the same was not proved in standard required by the law.

In order to appreciate the context in which this appeal originated; I find it necessary to begin with a summary of the essential facts of the dispute. It was on 02.04.2022 the respondent herein stopped the car which was hired by the appellant and took away a car by force from the driver, the said car by then was carrying and distributing the appellant goods, to wit, small and big loaves, cakes and biscuits in their respective crates and an EFD machine.

The appellant claimed that he entered into an oral agreement with the respondent for the said car to be used for carrying and distributing his goods. The respondent refuted to have ever been in contract with the appellant to use his car as the appellant only visited him once at his home for car testing purposes only where he went with that car and never returned back. It is

from that act, the respondent decided to take his car which was on a way to distribute the appellant goods and sent it to a police station where the appellant was called for interrogation. Later the appellant decided to file a suit at the Primary court claiming for payments of Tsh 4,470,000/= being the amount equivalent to goods that were in the car.

When the matter was placed before me for hearing, it was agreed and ordered the same be argued by way of written submissions, where the respondent was represented by Mr. Denis Maro the learned Advocate while the appellant was represented by Mr. Elia J. Kiwia.

Submitting on the first ground that the court erred in law and fact for relying on the issue which was not raised on the trial court, the Appellant submitted that the matter of tort was not raised at the trial court hence it was wrong for the respondent to raise it on the appellate court. He was of the view that the respondent in appeal to the district court raised the new issue that the nature of dispute between them was of tort the issue that was never raised before and was supposed to be raised during the trial court and not the appellate court. To support his contention, he relied on the decided cases of **Joel Mwangambako vs Republic** (Criminal Appeal No. 519 of

2017) TZCA and the decision of **Halfani Rajab Mohamed vs Republic** [2020] TZHC 1229 (TANZLII).

In respect to 2nd ground and 3rd ground in alternative, the appellant submitted that the District Magistrate erred in law and fact by only relaying on the incredible and unbelievable evidences adduced by the respondent as it was reflected in page 7 of the appellate judgment that the respondent failed to prove that there was no agreement between them. The appellant further submitted that if it was a tort as presented by the respondent, still the respondent failed to prove the elements constituting such tort such as there must be a duty, the breach of the said duty and the damages suffered. To support his point the appellant referred on the decision of **Stanslaus Rugaba and AG vs. Phares Kabuye** (1982) TLR 338 and the case of **Hussein Iddi and Another Vs. Republic** [1986] TLR 166.

Submitting on the 4th ground that the Honourable Court erred in law and fact for ruling out that there was no contract between the parties, the appellant submitted that there was an oral agreement between the parties as it was evidenced in a conduct of the appellant who went to the respondent house and take a car and that he was communicating severally about the payments. The appellant by citing section 10 of the law of Contract Act Cap

345 R.E 2019 submitted that the law recognises an oral agreement as a valid contract hence there was a valid contract between the parties. He was also in the view that once parties enter into an agreement they were then bound by the same terms and condition of the agreement as it was stipulated in the case of **Miriam Maro vs. Bank of Tanzania** Civil Appeal No. 22 of 2022(unreported) quoting the case of **Yara Tanzania Limited vs. Catherine Assenga** [2021] TZHC 259 (TANZLII).

The appellant submitting the 5th and 6th grounds together claimed that the District Court erred in law and fact by ruling that the Primary Court had no jurisdiction in determining the matter without considering the nature of the claim. It was the appellant submission that the District Court erred in deciding the appeal in favour of the respondent without proving standard required by the law. He submitted further that in civil litigation the burden of proof lies on the one who alleges as provided for under section 112 of **The Evidence Act** Cap 6 R.E 2022. In support to his contention, he referred on the decision of **Ernest Sebastian Mbele vs. Sebastian Sebastian Mbele and Anothe**r [2021] TZCA 168 (TANZLII).

Responding the above, Mr. Kiwia in respect to the first ground contended that, point of law can be raised at any time even in a second

appeal. The counsel supported his assertion by a decision of **Barclays Bank T. Ltd vs Tanzania Pharmaceutical Industries & Others** [2019] TZCA 159 (TANZLII).

The learned counsel further submitted that the District Court being the 1st appellate court had powers in re-assessing and re-evaluating evidence of the trial court, to buttress his stance he invited me to observe the case of **Ndizu Ngasi vs Masisa Magasha** High Court of Tanzania at Tabora, Criminal Appeal No 140 of 1997 and the decision of **Yasin Ramadhani Chan'ga vs. Republic** Court of Appeal Tanzania at Dar-es salaam Criminal Appeal No 46 of 1996.

In reply to the 2nd and 3rd grounds, Mr.Kiwia was of the view that the appellant failed to show how the District Court erred in law and facts in making its decision. He submitted that the appellant was duty bound to show the nature of evidence that the Hon. District Magistrate failed to consider so that the respondent could have replied.

In regards to the 4th ground, Mr. Kiwia replied that in the trial court records, nowhere it was found that there was contract between the parties and since the appellant was the one who filed the case in the trial court then

the burden of proof was with him to prove the existence of such contract as burden does not shift to the respondent. He further contended that no contract was entered between them instead the appellant disappeared with the respondent motor vehicle.

In respect to the amount claimed, Mr.Kiwia contended that the foundation of the case by the appellant in a trial Court was never a relief for breach of contract rather a claim of damaged goods amounting to Tsh 4,800,000/= which was a tortuous act. The learned counsel further replied that the appellant at the trial court did not testify about entering into a contract with the respondent rather he was claiming the payments of damaged goods.

In regards to the 5th ground which was consolidated with the 6th ground, the counsel contended that it was misconceived by the appellant counsel that the ingredients of tort were not met. The counsel was of the view that if the respondent failed to prove the tortuous ingredients, then there was nothing that was ever damaged and if so, the appellant had no case against the respondent. He further submitted that the trial Court misdirected itself and tried the matter by assuming that it had jurisdiction over a claim of damaged goods worth Tsh. 4,480,000/= and not considering

that the said claim did not fall under section 18(1)(a)(iii) of **The Magistrate Court Act** Cap 11 R.E 2019. Mr.kiwia thereafter concluded that the trial court lacked jurisdiction because appellant claims was rooted on matters of tort, he then invited me to be persuaded by a decision of this court in **Registered Trustees of the Islamic Solidarity Center vs Jaabir Swalehe Koosa and 4 Others** [2020] TZHC 4254 (TANZLII).

In his rejoinder, the appellant reiterated briefly his submission in chief and further maintained that the amount Tsh. 4,480,000/= arose out of breach of contract, therefore the trial court was vested with power to try the case. To support his posture be sought he referred the case of **Togo Sempeho Mgonya vs Lilian Munisi** [2022] TZHC 14295 (TANZLII)

Having considered the rival submission on both sides, before going on determining grounds of appeal submitted above, I find proper to address the concern raised by the appellant while rejoining her appeal that the reply submission by the respondent was lodged in the wrong registry of 'Moshi Land Registry' while the same was not a land matter. I have scanned the entire heading it has cited the same case and the same court of origination with proper case number, further below parties stipulates pursuant this court order dated 25th day of October 2023 which is true according to this court

record. In that regard I am settled the said mistake is a typo error, however according to the differentiation stated in my view neither the appellant was prejudiced nor fatal to vitiate the appeal, accordingly invoked the principle of overriding objective to serve the purpose.

Back to grounds of appeal, I am mindful this being the second appeal matters not raised at the first appellate court cannot be raised in a second appellate court. See for instance cases of **Juma Manjano vs Republic,** Criminal Appeal No. 211 of 2009, **Sadick Marwa Kisase vs Republic,** Criminal Appeal No. 83 of 2012 and **George Mwanyingili vs Republic,** Criminal Appeal No. 335 of 2016 and **Singita Trading Stores (EA) Ltd vs**. **Commissioner General, Tanzania Revenue Authority,** Civil Appeal No 57 of 2020 (all unreported) to mention few. In **Singita Trading Stores (EA) Ltd** (supra) the Court of Appeal quoted with approval the case of **Haystead vs Commissioner of Taxation [1920] A.C 155** which on **page 166 Lord Shaw** observed that: -

> *"Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case or new version which they present to what should be a proper apprehension, by the Court of the legal result ...*

If this were permitted, litigation would have no end except when legal ingenuity exhausted"

I am saying the above because when the appellant argued ground no. 2 in alternative to ground no. 3 brought in the issues of tort and unfortunately continue to submit that the respondent failed to prove it. In this regard first the issue of tort was neither discussed at the appellate court nor used to reach the decision of the appellate. Thereat the case ended after finding there was no contract between the parties as per Section 18(1)(iii) of the Magistrates' Courts Act CAP 11 R. E. 2019.

In this appeal the appellant has raised six grounds of appeal, while at the first appellate court raised only three grounds of appeal, however upon thorough scrutiny others are duplicity of others in their substance except ground number 3 which will be argued separately, thus I see no need to expunge any, but I find convenient only two issues cut across all grounds above, that is first whether the trial court had jurisdiction to try this matter and second if the above is answered in affirmative whether the amount awarded was justified.

The above notwithstanding, before I proceed with the two issues, I find it compelling to start with ground number 3. The appellant contention in this ground is that the first appellate considered the matter fall under tort without considering the nature and evidence adduced by the appellant. As said above this was not the reason by the trial court when allowed the appeal.

Nevertheless, since the issue that the trial court dealt with tortious case is the issue ousting jurisdiction of the trial court, the same can be raised at any stage of the trial, even at the appellate level. See **Ibrahim Omary vs The Inspector General of police &Two others,** Civil Appeal NO.20 of 2009, **M/S Tanzania China Friendship Textile Co. Ltd vs. Our Lady of Usambara Sisters** [2006] TLR 70. **Fanuel Mantiri Ng'unda vs.Herman Mantiri Ng'unda and 20 others** , Civil Appeal No.8/1995 **Consolidated Holding Corporation Ltd vs Rajan Industries Ltd and Bank of Tanzania**, Civil Appeal No.2 of 2003 Court of Appeal (All unreported) to mention few. In view thereof, I am forced to decide on the same.

It is clear from the trial records that the appellant sued the respondent for the Claim of Tsh. 4,700,000/= amount that was totalled due to goods that were in the car, it was not disputed by the respondent himself that he

took the said car with the appellant goods inside. It is further evidenced in the trial court records the cause of action which is shown on claim form '*Fomu ya Madai No.2'* which reads as follows;

"HATI YA MADAI

'MADAI YA SHILINGI TSH 4,700,000/= YALIYOTOKANA NA BIDHAA ZILIZOKUWEKO KWENYE GARI WAKATI MDAIWA AKICHUKUA GARI"

In the foundation of the above claim, the appellant at the trial testified on how the respondent took the said motor vehicle with his goods, as alluded earlier these facts were not refuted by the respondent. In my view of the above facts, it is pertinent to note that this act is interference with the goods of another, which is a tort of conversion.

To borrow the words of **Winfield and Jolowicz on Tort** 15th Ed, at page 588 says what amount to tort of conversion as follows;

" Conversion may be committed by wrongfully taking of goods, by wrongfully disposing them, by wrongfully destroying them or simply refusing to give them up when demanded".

From the above excerpt, I am settled that conversion by itself is a common law tort. It is a trite law, the Primary Court does not have jurisdiction to entertain cases based on common law torts, However, it has jurisdiction on cases of civil nature relating to breach of contract and customary torts. See **Togo Sempeho Mgonya vs Lilian Munisi** [2022] TZHC 14295 (TANZLII). Thus, by virtue of section 18(1)(a)(iii) of the Magistrate Court Act Cap.11 the jurisdiction of the Primary court is ousted to try common law torts.

Therefore, as repeatedly said above though this was not ground used by the first appellate court to quash the decision of the trial court, the above is the position of the law, thus, the trial court had no jurisdiction to try common law tort as stated above.

Back home to see the route followed by the first appellate court to allow the appeal, to start with the first ground, the powers of primary court in adjudication of civil matter is provided under Section 18(1)(iii) of the Magistrates' Courts Act CAP 11 R. E. 2019. Which provides;

"18 (a) in all proceedings of civil nature-

(iii) for the recovery of any civil debt arising out of contract, if the value of the subject matter of the suit does not exceed thirty million shillings, and in any proceedings by way of counterclaim and set-off therein of the same nature not exceeding such value;"

As rightly raised by the first appellate court, the point for determination is whether there was a contract between the parties. In their submissions the appellant maintained that there was oral agreement between the parties and that was evidenced by their conducts as the applicant took a respondent's car and constantly communicated with the respondent about the payments. The respondent in his reply refuted to ever entering into an agreement with the appellant and that the appellant forceful abscond with his car.

According to the record of the trial court, the said alleged oral agreement did not get any witness to prove whether it existed, it is a trite law who alleges must prove, a mere saying it was oral agreement in my view remained to be alleges not proved.(See rule 6 of The Magistrate'Courts (Rules of Evidence in Primary Courts) Regulations GN No.66 of 1972), nonetheless the elements of agreement or contract were not stated in

evidence if at all it was done, that is for instance at page 3 and 4 of the typed proceedings nowhere the appellant's testimony proved consideration, taking regard all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object.

However, in other part the respondent brought witness SU1 and said is the one who was present when the said motor vehicle was taken by the appellant. At page 12 of the typed proceeding testified that;

> *"tarehe 3/3/2022 majira ya tano ya asubuhi mume wangu alinipigia simu akaniambia kuna mtu anahitaji gari ya kusambaza mikate ambazo na akuja hapo nyumbani ilipofika saa saba mchanna walikuja vijana watatu wakasema wanakuja kuangualia gari nilimpigia mume wangu simu, akaongea na kuniambia niwaonyeshe gari, wakaniambia kuwa wao ni madereva tu wameagizwa baada ya hapo walisema wanaenda kumwita muhusika waliondoka na kurudi saa tisa mchana, kijana mmoja aliyekuja mwanzo na muda huo nilimpigia mume wangu na akaja, mdai aliangalia gari na kusema ameliona hivyo wakae chini waandikiane mkataba mume wangu alipigiwa na kuwambiwa, nimzikilize na atakacho kiongea nipe mrejesho,……*
>
> *……ndipo mdai akasema anaomba kutest gari, mume wangu nilimpigia na akaniambia nimruhusu, alitoka na gari wakaendelea kuniambia kama tunauuza gari tumwambie,*

alienda na hakurudi. Nilikuwa na namba yake ya simu na namba ya simu ya dereva maana yule dereva sio mgeni kwangu nilimuuliza nani ataendesha na akasema ni yeye, jumamosi tulimpigia mdai pamoja na dereva na wote wakawa hawapatikani. Jumapili tulimpigia mdai na akapokea simu, nikamwambia inabidi tukae chini iii tuandike mkataba akaema gari ina vitu vya kubadilisha vyenye thamani ya milioni nne na laki saba, nilimwambia hiyo gari sio mbovu na kama ni mbovu rudisha gari yetu nyumbani na asifanye chochote arudishe kama alivyoichukua, baada ya hapo tukawa tukimpigia simu hapatikana kabisa."

From the above evidence, I am settled it is clear that there was no agreement between the parties proved, and this is because as quoted above the respondent evidence was supported by reliable witness, hence in my view the same is heavier than the evidence of the appellant tendered at the trial court. Thus, complied with the principle that the person whose evidence is heavier than that of the other is the one who must win. (See **Hemed Said v. Mohamed Mbilu [1984]** TLR 113.

It is from that outset; I concede with the findings of the District Court that no agreement was made between the parties as the Appellant failed to prove that there was a contract between them. Therefore, I am satisfied

the first issue raised is answered not in affirmative, consequently the second issue also is diminished forthwith.

Having said so, I am settled that the first appellate court decided properly. Thus, I find no reason to fault its decision rather than sustaining it forthwith. Consequently, this appeal is devoid of merit and is hereby dismissed in its entirety with costs. It is so ordered.

DATED at **MOSHI** this day of 29th February 2024.

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

X

JUDGE
Signed by: A. P. KILIMI

Court: Judgment delivered today on 29th day of February, 2024 in the presence of both parties.

Sgd; **A. P. KILIMI**
JUDGE
29/02/2024

Court: Right of Appeal duly explained.

Sgd; **A. P. KILIMI**
JUDGE
29/02/2024