

IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 61 OF 2023

MUSSA RAMADHANI APPELLANT

VERSUS

VERONICA ALPHONCE RESPONDENT

JUDGEMENT

18th April & 25th June, 2024

MWANGA, J.

This is a second appeal. It originated from the suit in Civil Case No. 47 of 2022 instituted by the appellant against the respondent at the Primary Court of Kibaha at Maili Moja, in which the appellant claimed, among other things, Tshs. 280,000/= for the supply of two sacks of sweet potatoes to the respondent and Tshs. 270.000/= as disturbance costs.

Briefly, the facts can be stated. On 12th May 2022, the respondent pressed an order for two sacks of sweet potatoes from the appellant, who was in the Mpanda District in the Katavi Region. The deliveries were made on 14th May 2022 at Mbezi Bus Stand in Dar Salaam Region where the respondent received the said potatoes. According to the appellant, the

respondent was obliged to pay for the supply within two days after the deliveries. However, the respondent claimed that the amount fetched for the sale was Tshs. 60,000/= as the potatoes were packed in two small sacks (viola) weighing 100kg and not 100kg each, as the appellant contends. The respondent also alleged that some of the potatoes had undergone decaying, so she could not fetch the substantial amount anticipated by the appellant.

The appellant disagreed with the respondent's contention. Hence, he referred the dispute to the Kwembe Ward tribunal, where he was advised to take the matter to court. At the primary court of Kibaha at Mailimoja, the court ruled in favor of the appellant, stating that the respondent told the appellant to pack the potatoes in a sack weighing 100kg. Hence, the court is satisfied that the respondent received two sacks of potatoes weighing 100kg each.

The reason for such a finding was based on the evidence adduced by the appellant and the contradictory statements of the respondent regarding the volume of the potatoes, both at the tribunal and the trial court; for instance, at the ward tribunal, the respondent stated that she received one sack of potatoes weighing Tshs. 60,000/= whereas in the trial

court she said she received two sacks of potatoes valued Tshs. 120,000/=.

Likewise, she said one sack of potatoes valued at Tshs in the cross-examination. 80,000/- to 130,000/=.

Because of that, the trial court concluded that the appellant was correct, testifying that the agreed price was Tshs. 140,000/- for each sack of potatoes. The trial court also refused the respondent's contention that some potatoes got rotten.

In the end, the court ordered the respondent to pay Tshs. 280,000/- as specific damages and Tshs. 50,000/= as general damages for the inconvenience caused, totaling Tshs. 330,000/=.

The respondent was aggrieved with the decision. She, therefore, appealed against the decision. The District Court quashed and set aside the decision, stating that the appellant failed to prove that he sent two sacks of potatoes. He also failed to prove that the potatoes were for business or being helped.

The appellant believed he had proved his case at the trial court to the required standard. Now, this is the second appeal against the District Court decision based on the following grounds;

1. The first appellate court erred in law and fact to allow appeal without considering and evaluating evidence both parties adduced at the trial court.
2. The first appellate court erred in law and fact in holding that there was no contract between the parties while the appellant delivered two sacks of potatoes to the respondent for business purposes.
3. The first appellate court erred in law and fact to allow appeal while the appellant herein proved his case to the required standard.
4. The first appellate court erred in law and fact to allow an appeal for failure to order the respondent to pay the appellant while the respondent did not dispute receiving two sacks from the appellant,
5. The first appellate court erred in law and fact to order the respondent to file a written submission supporting the appeal, and the appellant was ordered to make an oral submission.

The appellant appeared in person when the matter was scheduled for hearing, whereas the respondent failed to appear. Hence, the hearing proceeded ex parte against her.

I prefer to start with the second ground of appeal. The appellate court erred in law and fact to hold that there was no contract between the

parties while the appellant delivered two sacks of potatoes to the respondent for business purposes. Section 2 (1) (e) and (h) of the Law of Contract Act, Cap. 345, R.E. 2022, as amended by Act No. 13 of 2015, defined the contract as every promise and every set of promises, forming the consideration for each other, which is enforceable by law. Section 10 of the Act provides that all agreements are contracts if they are made by the free consent of parties competent to contracts, for a lawful consideration and with a lawful object. The said contract may be written or oral or can be inferred from the conduct of the parties. The Sale of Goods Act, Cap 214 amplifies the position that the contract of sale may be made in writing (either with or without seal) or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.

From the evidence adduced, the respondent admitted that the appellant sent him two sacks of potatoes, which she received at the Mbezi bus stand. As rightly observed by the trial court, the respondent kept talking about the market price of one sack of potatoes from Tshs. 60,000/=, Tshs. 80,000/=, Tshs. 100,000/= and Tshs. 130,000/=. That is reflected in the proceedings at the trial court and ward tribunal. Her

evidence at the trial court is that she ordered two sacks of potatoes (viroba viwili). The bus receipt dated 13/05/2022 shows that the appellant paid 20,000/=, and it is silent on the quantity and weight of the sacks of potatoes. The appellant who sent them contends that two sacks of potatoes weighed 100kg each. The respondent denies the fact.

In my view, since the respondent admits that she received two sacks of potatoes packed and there is no evidence that she protested the quantity and weight of the potatoes after she had received them, I am convinced that the testimonies of the appellant were valid and credible. Looking at the evidence in records, the respondent raised an issue after she had sold the potties and attempted to send Tshs 60,000/= sales money to the appellant, which he refused. Again, there was great concern about the uncertainty about the price of the potatoes, as pointed out by the respondent.

Given the above, this court joined hands with the findings of the Trial court that the appellant was correct, testifying that the agreed price was Tshs. 140,000/- for each sack. And conjunctively, it is clear that there was a contract between the Appellant and Respondent and that parties are bound by the agreements they freely entered as it was held in the case of

Simon Kichele Chacha Vs Aveline M. Kilawe, Civil Appeal No. 160 of 2018) [2021] TZCA 43 (26 February 2021). Therefore, this ground of appeal has merit.

Coming back to the first ground of appeal, the Appellant contended that the first appellate court erred in law and fact by allowing the appeal without considering and evaluating the evidence both parties adduced at the trial court. The appellant submitted that the judgment of the first appellate court was made in the Respondent's favor without any justification.

I have evaluated the available evidence and considered the appellant's submission concerning the decision of the first appellate court. Looking at the 1st appellate court records on page 7 of the judgment; the 1st appellate magistrate stated that the Appellant failed to prove if the sacks were 100kg. Also, he ruled out that the appellant failed to prove if the potatoes were for business purposes or if he was helped to sell the potatoes. Therefore, it contradicts the standard of proof as required in civil cases.

Indeed, I have also carefully studied the evidence of SM1 at the Trial court that the respondent (then Mdaiwa) told the SM1 to pack the potatoes

in a sack weighing 100kg; at the ward tribunal (P1), the respondent stated that she received one sack of potatoes weighing Tshs. 60,000/= whereas in the trial court she said she received two sacks of potatoes valued Tshs. 120,000/=. Likewise, she said one sack of potatoes valued at Tshs in the cross-examination. 80,000/- to 130,000/=; hence, the trial court ruled that the respondent received two sacks of potatoes weighing 100kg due to a contradictory statement from the respondent regarding the volume of the potatoes.

Indeed, the Respondent's evidence was undoubtedly vague. It did not particularize how she reached the exact figure of potatoes as they agreed with the Appellant. This makes the proof of the appellant heavier than that of the respondent. Therefore, the trial court correctly concluded that the appellant was correct, testifying that the agreed price was Tshs. 140,000/- for each sack. In the case of **Hemed Said vs. Mohamed Mbilu [1984] TLR 113**, it was held that:

"Where, for undisclosed reasons, a party failed to call material witnesses on his side, the Court is entitled to draw an inference that if the witness were called, they would have given evidence contrary to the party's interest."

Therefore, in the case at hand, and by analogy, it is the same with contradictory testimonies. The court is entitled to draw an inference that the witness would have given evidence contrary to the party's interest. Therefore, it is true that the first appellate court made its decision without any justification. This ground of appeal has merits.

In addition, on the 3rd ground of appeal, the Appellant contended that, the first appellate court erred in law and fact to allow appeal while the appellant herein proved his case to the required standard. It is settled law that he who alleges has a burden of proof as in the case of **Paulina Samson Ndawavya Versus Theresia Thomasi Madaha**, Civil Appeal No. 53 of 2017, the Court of Appeal observed that;

“It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap. 6 [R.E 2002]. It is equally elementary that since the dispute was in a civil case, the standard of proof was on a balance of probabilities. This simply means the Court will sustain such evidence more credible than the other.”

Based on the above and as it is in the 1st ground of appeal, the 1st appellate court held that the Appellant failed to prove if the sacks were

100kg. Also, he ruled out that the appellant failed to prove if the potatoes were for business purposes or if he was helped to sell the potatoes. That was wrong since the Appellant, in his evidence, had shown how they agreed with the respondent by sending the potatoes and through the bus tickets were two sacks. If she found the sacks differed from what she had ordered, the Respondent would only send them back to the Appellant since they did not meet her requirements/terms, rather than being not straight to the potatoes' price and weight.

In that regard, this court finds that the Appellant proved his case to meet the required standard. Therefore, this ground of appeal has merits.

4th ground of appeal, the appellant contends that the first appellate court erred in law and fact to allow an appeal for failure to order the respondent to pay the appellant. In contrast, the respondent did not dispute receiving two sacks from the appellant. He submitted that it was wrong for the court to hold otherwise, while the respondent did not dispute receiving two sacks of potatoes.

Upon thorough perusal of the records of the 1st appellate court, I have noted that on page 7 of the impugned judgment, the 1st appellate magistrate stated that for ease of reference, I quote;

"It is not disputed that potatoes were sent to the appellant; what is disputed is the size of the sacks and the value of the said potatoes. "

Given the quote, it is seen that there was no dispute on the receipt of the two sacks of potatoes. There is no dispute that the Respondent sold the potatoes. According to her, she fetched Tshs 60,000/= . In that matter, I do not find any justification by the first appellate court to let the Respondent walk freely while admitting that she sold the potatoes and obtained a certain amount of money. It is settled law that where there is a wrong, there must be a remedy, as seen in the case of **Trade Union Congress of Tanzania (TUCTA) v. Engineering Systems Consultants Ltd & Others**, Civil Appeal No. 51 of 2016 (unreported).

In the case of **Swabaha Mohamedi Shosi vs. Saburina Mohamedi Shosi**, Civil Appeal no 98 of 2018,

"An appellate court can Interfere with the discretion of the lower court If, among others, It has acted on a matter that should have acted upon, or It has failed to take Into consideration that which It should have been taken, and as a result It has arrived at a wrong conclusion."

Given the above, it is essential to note that the 1st Appellate court was supposed to consider that the Respondent did not dispute the potatoes' receipt. She was also not supposed to be let free from the payment of even what she agreed to sell. She cannot benefit from what is not hers. In that regard, this court finds this ground of appeal has merit.

Lastly, regarding the 5th ground of appeal, the Appellant contended that the first appellate court erred in law and fact in ordering the respondent to file a written submission in support of the appeal and the appellant to make an oral submission. The appellant submitted that the case was ordered to be heard by written submission. He was heard by oral, and the respondent was heard by written submission.

Having read the thoroughly typed proceedings of the 1st appellate court on pages 2, 3, and 4, it is seen that the case was heard by oral submission, and no order of written submission was made. In that regard, the appellant's argument is misconceived; therefore, this ground of appeal fails.

As a result, the appeal is partly allowed to the extent and for various reasons.

Given the above, the district court's proceedings and judgment are hereby

quashed and set aside. The primary court's decision is hereby upheld with costs.

Order accordingly.



A handwritten signature in blue ink, appearing to read "H. R. Mwangi".

H. R. MWANGA

JUDGE

25/06/2024