

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
ARUSHA SUB-REGISTRY
AT ARUSHA**

CIVIL APPEAL NO. 01 OF 2023

(Originating from Civil Case No. 09 of 2021, Before the Resident Magistrates'
Court of Arusha at Arusha)

EDWARD FRANCIS NTAKILIHO.....APPELLANT

VERSUS

**TENGERU ENGLISH MEDIUM NURSERY
AND PRIMARY SCHOOLS LTD.....RESPONDENT**

JUDGMENT

21st November, 2023 & 29th January, 2024

KAMUZORA, J.

This appeal intends to challenge the decision of the Resident Magistrates' Court of Arusha in Civil Case No 09 of 2021. Briefly, the Appellant and the Respondent entered into agreement for a car hire in which the Appellant's car was to be used by the Respondent to transport students to and from school. Sometimes later, the Respondent claimed that the Appellant's car had mechanical defects and could not continue shuttling students hence, opted to end contract with the Appellant. The Appellant instituted a suit before the resident magistrate court claiming

breach of contract against the Respondent. The trial court found that the Appellant was unable to prove his claim hence, dismissed the suit with costs. Dissatisfied, the Appellant brought this appeal on six grounds which are reshaped as hereunder: -

- 1. That, the trial magistrate erred both in law and in fact for failure to evaluate evidence hence, reaching to erroneous decision.*
- 2. That, the trial magistrate erred in law and fact by wrongly evaluating evidence and holding that the written contract was a continuation of the oral agreement between the Appellant and the Respondent.*
- 3. That, the trial magistrate erred both in law and in fact for basing its decision on exhibits D1, D2, D3, D4, D5 and D6 which never proved any fact on payment made by the Respondent to the Appellant.*
- 4. That, the trial magistrate erred in law and fact for passing judgment in favour of the Respondent basing on exhibit D7 which is not admissible under the law.*
- 5. That, the trial magistrate erred in law and fact in considering the testimony of DW3 who is a bank officer without taking into account that the bank officer cannot testify where the bank is not party to the case.*
- 6. That, the trial magistrate erred in law and fact in taking into account that Exhibit P2 was not a notice to terminate the contract as required by Exhibit P1 but was a termination letter which by itself is a breach of contract.*

Parties to this case opted to argue the appeal by way of written submissions and they both complied to the submissions schedule. As

matter of legal representation, the Appellant was represented by Mr. Engelberth Boniphace, learned advocate while the Respondent was represented by Mr. Bashir Malya, learned advocate.

In support of appeal, the Appellant's counsel adopted the memorandum of appeal and argued jointly for the 1st, 2nd, 3rd and 6th grounds of appeal. He submitted that the trial magistrate failed to evaluate evidence hence, reached to an erroneous decision. He explained that the Appellant tendered in his evidence the contract which was marked as exhibit P1. That, the said exhibit indicated that the contract between parties was entered on 1st August, 2020 and was to lapse within one year thus, the trial magistrate misdirected herself in interpreting clause 1.4 of the contract. To his interpretation, the contract commenced from 1st August, 2020 when it was signed and could end by 30th July 2021 and the written contract did not refer any oral agreement.

The counsel for the Appellant further submitted that, apart from DW1 no any witness who testified on payments made by the Respondent and the amount paid. He contended that instead of holding that there was a claim of 11,840,000 against the Respondent, the trial magistrate relied on mere statement by DW2 that the amount of TZS 2,270,000, TZS 1,600,000 and TZS 520,000 were paid in cash to the Appellant without proof of payment. The Appellant's counsel referred the principle of proof

under section 110 and 111 of the Tanzania Evidence Act and insisted that the Respondent was duty bound to prove that the amount of TZS 1,840,000 was paid to the Appellant. He maintained that, Exhibit D4 and D5 which are petty cash vouchers are not sufficient to prove payment.

The Appellant's counsel further submitted that generally, exhibits D1 to D6 which are petty cash vouchers never proved any fact over payment of the claimed amount by the Appellant. That, the petty cash vouchers ought to have been ignored in evidence for they had nothing showing that they belonged to the Respondent as they contained no name of authorising officer or paying officer and Respondent's official seal. That, the signatures of receiving party also differed hence, not directly proving that the money was paid to the Appellant. That, they also never indicated if there was tax paid by the Respondent thus, the same could not be relied upon in proving that the Respondent paid the Appellant.

The Appellant counsel also submitted that it was wrong for the trial magistrate to conclude that the oral agreement entered in January which was valid until July, 2020 affected the written agreement entered on 1st August, 2020. To him, the oral contract and written contract were two separate contracts entered in different periods. He insisted that the oral contract ended in July, 2020 and the written contract was intended for one year from the date it was entered, that is, from 1st August, 2020.

The Appellant's counsel also submitted that the Appellant had duty to transport students to and from school and he performed his duty. That, there is no proof if the Appellant was informed over the mechanical defects of the car and, or, if the Appellant refused to perform his contractual duty. To him, Exhibit D1 and D2 does not prove if the Appellant failed to perform his duty as they only show that the Respondent opted to hire another car for unknown reason. He was of the view that, car maintenance is the obligation of the Appellant thus, if the Respondent maintained the car, it was without consent of the Appellant. He insisted that there is no proof that the Respondent paid the contractual amount hence, the appeal be allowed.

On the 4th ground, the Appellant's counsel submitted that exhibit D7 collectively refer to police fine and NMB bank deposit slips. That, the said exhibits were first rejected by court for being copies. That, the same documents were tendered again by another witness and admitted in court. The Appellant's counsel was of the view that, since the said documents were prior rejected by court, they could not be re-tendered and admitted as exhibits. He referred to foreign cases which however were never annexed to the submission. He urged this court to refer the test of admissibility laid down under sections 64A, 65 66 and 67 of the

Law of Evidence Act, [Cap 6 RE 2022] and expunge Exhibit D7 collectively from record.

On the 5th ground, the Appellant's counsel submitted that the trial magistrate erred in considering the evidence of the bank officer while the bank was not a party to the case. He claimed that trial court ought to consider that there was violation of section 80 of the Evidence Act. To him, a bank officer does not qualify to be witness where the bank is not a party unless there is order of the court for the bank officer to testify. He also referred section 16 of the Bank of Tanzania Act, 2006 to insist that, since the officer was not authorised by the board of NMB, he could not testify in court for the case to which the bank was not a party. In concluding, the Appellant's counsel prays for the appeal to be allowed by declaring that the Respondent breached the contract and hence, be ordered to compensate the Appellant.

In reply, the Respondent's counsel also submitted jointly for 1st, 2nd, 3rd and 6th grounds. He argued that the trial magistrate well evaluated the evidence and reached to the correct decision. He referred page 3 of the trial court's judgment and insisted that the Appellant admitted himself that the written contract was a continuation of oral contract between the parties. To him, the written contract covered the period of 12 months of the year 2020.

The Respondent's counsel further submitted that, while the Appellant claimed in his evidence at page 8 of the proceedings that he was not paid the contractual money, he admitted during cross examination at page 12 of the proceedings that the money was paid through his bank account. That, the testimony by DW2 shows that from 17th March, 2020 to June, 2020 the schools were closed due to Corona Pandemic and since the Appellant was paid on daily basis, he could not be paid for the period he did not work. The counsel for the Respondent added that exhibit D1 to D6 which are petty cash vouchers proves that some amount was paid in cash and exhibit P7 which are bank pay in-slips proves that other amounts were paid through bank account.

The Respondent's counsel further submitted that the Respondent's witnesses, specifically the driver (DW4) proved that the Appellant's car had mechanical defects and could not be used for students' transportation. He was of the view that, since the car had defects, it could not perform the agreed task hence, the breach on the part of the Appellant. He insisted that, the trial magistrate correctly held that the Appellant breached as per section 39 of the Law of Evidence Act. He also referred the cases of **Miriam E. Maro Vs. Bank of Tanzania**, Civil Appeal No. 22 of 2017, CAT (unreported) and **Simon Kichele Chacha Vs. Aveline M. Kilawe**, Civil Appel No. 160 of 2018 CAT (unreported).

The counsel for the Respondent insisted that the Respondent complied to the legal requirement in terminating the contract. He added that, the evidence in record support the trial court's decision that the written contract entered in 1st August, 2020 was a continuation of oral contract between the parties.

On the argument that the Respondent never proved that the Appellant failed to transport students, the counsel for the Respondent referred page 35 to 36 of the proceedings in which DW2 testified that the Appellant's car had mechanical defects and they were forced to hire another car to transport students. He added that the petty cash vouchers were properly tendered and never objected by the Appellant and some of them were signed by the Appellant himself. That, the Appellant admitted the payment made through his account. He insisted that, all exhibits were proper and could be relied upon by the court.

On the 4th ground, the Respondent's counsel submitted that exhibit D7 complied to the legal requirement. That, the pay-in-slips were retrieved from bank system and tendered by the bank officer DW3 as required by the law.

On the 5th ground, the counsel for the Respondent submitted that section 16 of the Bank of Tanzania Act is applicable only to the Bank of Tanzania and not relevant to other banks. That, under section 80 of the

Evidence Act the bank officer cannot be compelled to produce banker's book or appear as a witness but it does not mean that the bank officer cannot testify in court. He insisted that, the bank officer in this matter was not forced to testify and there was an order of the court to summon the bank officer to testify in court. To him, the evidence of the bank officer was correctly relied upon by the trial court.

From the records, before signing a written contract, parties entered into oral agreement for the Appellant to shuttle the students to and from the Respondent's school. Both parties are in consensus that the oral agreement was entered in January, 2020 but they differ on the time it was supposed to end. While the Appellant claimed that oral contract was to end by July, 2020 and the payment was on daily basis, the Respondent through DW1 claimed that the oral contract was on daily basis as the Appellant was to be paid TZS 80,000 on each day he worked. For the Respondent, written contract was a continuation of oral contract. Now the question is whether, the written contract was a continuation of the oral contract or a separate one.

This could well be answered by the written contract itself (exhibit P1) and not oral evidence from parties' witnesses. Exhibit P1 shows that the contract was entered on 01st August, 2020 and contractual term was 12 months. There is no any clause in the contract which refers that the

written contract was a continuation of oral contract. I therefore agree with the Appellant's submission that the contractual term of 12 months indicated in the written contract was to be counted from 01st August, 2020 and not otherwise. Thus, I agree that the trial magistrate erred in holding that the written contract was a continuation of oral contract.

Despite that error, the question that need determination is whether there was proper evaluation of other evidence by the trial court. The Appellant claimed that there was no proper evaluation of evidence and exhibits tendered before the trial court. That, there was no proof that the amount of TZS 2,270,000, TZS 1,600,000 and TZS 520,000 were paid in cash to the Appellant because exhibits D1 to D6 which are petty cash vouchers could not prove facts over payment.

Going through the trial court judgment, I realised that the trial magistrate assessed evidence and accorded weight to all exhibits tendered in court. She assessed the Appellant's claim of TZS. 11,840,000 allegedly for the period from January to July, 2020. She agreed with the Respondent's evidence indicating that the Appellant's car never worked for the period from 17th March, 2020 to the end of June, 2020 because of government order for lock-out due Corona Pandemic. I agree that, such circumstances cannot be regarded as breach on the party of the Respondent. The trial magistrate also assessed exhibits D1 to D6 and was

satisfied that they proved payment to the Appellant. It was however contended by the Appellant that the petty cash vouchers ought to have been ignored in evidence for they contained inconsistencies to the extent that they could not be relied upon to prove payment.

Going through the trial court proceedings, the said documents were tendered and not objected by the Appellant. I also went through the said petty cash vouchers which the Appellant never objected and they show that although no signature of the authorising officer, the recipient of the money signed and the purpose for payment was also indicated. For instance, petty cash voucher dated 17/03/2020 shows that the Appellant Edward Francis Ntakiliho received cash TZS 1,600,000/= for car hire for the month of February 2020. He never disputed to have signed the said petty cash voucher thus, his claim that he was never paid for the oral agreement is unfounded. The petty cash voucher dated 15/07/2020 also indicate that the Appellant was paid TZS 520,000 for transport hire and he never denied to have signed the same. This proves that even after the schools were re-opened, the Appellant was paid for hire of his car contrary to his allegation that he was never paid for the oral contract. The Appellant's argument that the petty cash vouchers contained no name of authorising officer or paying officer and Respondent's official seal is in my view, baseless. Similarly, the claim that the petty cash voucher did not

indicate is the Respondent paid tax is baseless because, this matter is not related to dispute over tax or assessment of tax.

On the argument that the notice for termination did not comply to the terms of the agreement, I find that Exhibit P2 which is a notice to terminate the contract complied to the requirement under the agreement terms clause 3 in exhibit P1. Although it does not indicate the date it was prepared, it indicates the date it was received by the Appellant which is 17/12/2022. The same also indicate that the termination will be from 12/01/2021 which is one month from date of the notice for termination. Thus, the contention that the notice contravened the terms of agreement is unfounded. I therefore find that, despite error in assessing the relationship between oral and written contract, the trial magistrate correctly evaluated and gave proper weight to the rest of the evidence including exhibits D1, D2, D3, D4, D5 and D6 as well as exhibits P1 and P2.

On the argument that exhibit D7 which is the bank pay in slips are not admissible under the law for they were first rejected by the same court, this court revisited the proceedings of the trial court. At page 26 to 28 of the proceedings, the Respondent through DW1 attempted to tender the said documents but was objected and the objected was sustained on ground that it did not meet legal requirement. The second attempt was

through DW3, a bank officer as can be found at page 55 of the proceedings. Again, the objection was raised and the basis of objection was that the officer tendering the document had no authority to testify while the bank was not party to the case and thus, contravened section 80 of TEA. He also claimed that since the document was prior objected, it could not be tendered again in the same case as doing so, is contrary to section 34 of the Evidence Act. Despite the objection, the trial court was satisfied that the document met the legal requirement and admitted the same as exhibit D7.

I agree with the trial court's reasoning in admitting the bank pay in slips. There is no doubt that they were first objected for being secondary evidence and being tendered by a person who was not addressee of custodian of the same. But they were later admitted upon being tendered by the bank officer who explained very well how he came into contact for the pay in slips as the bank was a custodian of the same. The contention by the Appellant that the bank officer breached duty of confidentiality by disclosing client's information cannot stand since this is not the case against the bank. Nevertheless, the bank officer did not tender the bank statement of the Appellant for him to claim that his personal information was disclosed. What was tendered are bank pay in slips which are not confidential personal information of a client because it was prepared by

another person to show that certain amount was deposited in the Appellant's account. I therefore find this ground devoid of merit.


On the 5th ground that the trial magistrate erred in considering the evidence of the bank officer while the bank was not a party the case this court finds this argument misconceived. I agree with the Respondent's argument that section 80 of the Evidence Act does not prohibit the bank officer from testifying in any case which the bank is not a party. It is in record that the Respondent's counsel requested for summons for witnesses to testify in court and nothing shows that there is any witness who was compelled to produce any document or testify in court. Thus, the Appellant's contention that there was contravention to the provision of section 80 of the TEA cannot stand. Similarly, section 16 of the Bank of Tanzania Act, 2006 is inapplicable to the circumstance of this case. The witness DW3 was a bank officer from NMB and not Bank of Tanzania and he needed no authorisation of the Bank to testify upon being summoned to appear before the court. Basically, we have to ask ourselves the purpose of DW3's testimony. There was a claim that the Respondent never paid anything to the Appellant regarding their car hire agreement, Unfortunately, the Respondent insisted to have paid him in cash and through his bank account. What was tendered by DW3 are certified bank pay in slips in bank custody indicating the amount deposited by the

Respondent in Appellant's bank account. These were very necessary to counter the Appellant's claim that he was never paid by the Respondent. I therefore find this ground devoid of merit.

From the above arguments and reasons there to, it is the finding of this court that the appeal is totally devoid of merit, I therefore proceed on dismissing the appeal in its entirety with costs.

DATED at ARUSHA this 29th Day of January, 2024.




D.C. KAMUZORA
JUDGE