IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MKUYE, J.A., GALEBA, J.A., And RUMANYIKA, J.A.)

CIVIL APPEAL NO. 162 OF 2018

JUMA KANA.....1ST APPELLANT
MICHAEL ERASTO.....2ND APPELLANT

VERSUS

FITA TABU.....RESPONDENT

[Appeal from the Decision of the High Court of Tanzania, Mwanza District Registry at Mwanza]

(De Mello, J.)

dated the 25th day of July, 2017
in
Civil Appeal No. 4 of 2014

.....

JUDGMENT OF THE COURT

29th April, & 12th May, 2022

GALEBA, J.A.:

Fita Tabu, the respondent in this appeal, was the plaintiff in the Primary Court of Ndagalu in Magu District within Mwanza Region. He sued Juma Kana and Michael Erasto the first and second appellants respectively, for recovery of TZS. 1,492,160.00 allegedly, being unpaid balance after having sold to them 3,776 kilograms of raw cotton on 8th September 2012 worthy TZS. 2,492,160.00. His allegation in the Primary Court and before the two appellate courts in below, the District Court and the High Court and even before us, was that out of the full price of the cotton he sold, the appellants paid him

only TZS. 1,000,000.00 and promised to pay the balance of TZS. 1,492,160.00 at a later date, a promise they did not live up to. That was therefore the basis of his civil action in the Primary Court. To support his claim, he tendered exhibit P1 which was a purchase payment voucher No. 2222405 dated 8th September 2012 which was issued to him by the appellants. This exhibit, P1, as we will see at a later stage, had some words scribbled in free hand over leaf and those words, to the respondent, constituted sufficient documentary proof to substantiate his claim. That is the version of the respondent which he has maintained throughout from the Primary Court up to this Court.

The first appellant was a cashier cum accountant of Igembesabo Cotton Growers' Group, which was a communal setting for Nyang'hanga village cotton growers, through which those who wished to sell their harvests to Alliance Genneries Limited, would channel their crops. The second appellant was the chairman of the group.

The appellants' response to the respondent's claim in the Primary Court was straight forward. They stated that the amount of cotton that they received from the respondent was 4,107 kilograms worthy TZS. 2,656,620.00 and that the amount was fully paid. Upon payment, they gave the respondent

exhibit P1 but the document did not have the free hand written words at its back. They denied any knowledge of the respondent's claims of selling to them 3,776 kilograms of cotton worthy TZS. 2,492,160.00. They disputed having paid TZS. 1,000,000.00. as advance payment to the appellant and withheld TZS. 1,492,160.00. as the balance. To support their defence, they tendered exhibit D2 which was a purchase payment voucher No. 2222405 dated 8th September 2012. The document, exhibit D2 was identical to exhibit P1 as its carbon copy which was retained after issuing exhibit P1 to the respondent. Exhibit D2 does not have any writings on its reverse side like exhibit P1.

The Primary Court heard the case and finally decided that the respondent proved his case against the appellants and decreed that the appellants were indebted to him the claimed amount of TZS. 1,492,160.00. The appellants were dissatisfied with that decision. So, they lodged Civil Appeal No. 11 of 2013 at the District Court of Magu at Magu. The appeal was argued, and on 13th December 2013, the District Court reversed the decision of the Primary Court on grounds that the respondent had no genuine claim against the appellants. It observed that the respondent had forged Exhibit P1 because Exhibit D2 which was tendered by the first appellant did not have

any free hand written words behind it like it was for Exhibit P1. That is to say, first appellate court believed the position of the appellants and allowed their appeal. The respondent was, however, aggrieved by the first appellate court's decision and lodged Civil Appeal No. 4 of 2014 in the High Court.

The High Court heard the appeal which was argued by way of written submissions and reversed the decision of the first appellate District Court. It reversed it on grounds that the purchase payment voucher No. 2222405 which was presented by the appellants, that is exhibit D2, was likely to have been forged. The second appellate court therefore upheld the decision of the Primary Court. This decision of the High Court aggrieved the appellants, hence, the present appeal.

This appeal is predicated upon the following two grounds of appeal:

> *"1. That the appellate court erred in law entered (sic) the judgement in the respondent's favour, based its decision on the documents evidence alleged to be forged without any authenticity of the same.*
>
> *2. That the appellate court erred in law failure (sic) to determine the verdicts of the respondent's contract which was an admissible (sic) before the law."*

At the hearing of this appeal on 29th April, 2022, both parties appeared unrepresented, and were both ready to proceed with hearing of the appeal.

As for the first ground of appeal, the first appellant submitted that the High Court erred to hold that exhibit D2 was forged. He submitted that the document was genuine and authentic. He contended that exhibit D2 was a purchase payment voucher No. 2222405 dated 8th September 2012 relating to purchase of 4,107 kilograms of raw cotton from the respondent worthy TZS. 2,656,620.00. He submitted that after that purchase, the amount was paid to the respondent. He argued that what the respondent tendered in the Primary Court as exhibit P1 was the same purchase payment voucher No. 2222405 dated 8th September 2012 relating to 4,107 kilograms of raw cotton worthy TZS. 2,656,620.00, only that exhibit P1 had some writings overleaf. He contended further that the respondent tendered nothing in the Primary Court to support his allegations. Based on his arguments, the first appellant implored us to reverse the decision of the High Court and allow their appeal with costs.

The second appellant, in supporting the first ground of appeal, challenged the High Court questioning why was he joined to the case, because as a chairman of his local cotton growers' group, his duty was not to

buy cotton. He was of the position that if there was to be any case at all, the same ought to have been between the first appellant and the respondent, for they were parties to the cotton sale transaction but not him. He prayed that the appeal be allowed with costs.

In reply to the appellants' arguments, the respondent submitted that when he sold to them, 3,776 kilograms of cotton worthy TZS. 2,492,160.00., the appellants gave him a wrong receipt showing that he had sold to them 4,107 kilograms of raw cotton worthy TZS. 2,656,620.00 and he complained. He contended that they paid him TZS. 1,000,000.00 only promising to pay him the balance of TZS. 1,492,160.00. on a later date, but they did not honour their promise and he had to file a law suit in the Primary Court to recover the debt. He stated that the writings on the reverse side of exhibit P1 were written by both the first and the second appellant in turns, and handed it to him. When we inquired as to the evidence that he received only TZS. 1,000,000.00 with a promise to receive the balance later, he initially and with confidence submitted to us that everything was written by the appellants on the reverse side of exhibit P1, but when we wanted him to take us to the exhibit, he noted that there were no such details on the reverse side of exhibit P1. Nonetheless, he was in support of the decision of the High Court and beseeched us to uphold it and dismiss the appellants' appeal with costs.

In resolving this ground of appeal, the issue for our determination is whether the second appellate court was right in holding that, exhibit D2 was likely a forged document. Determination of this issue calls for a close and a careful examination of both the High Court judgment and the disputed document, exhibit D2.

In retrospect, we must observe that this Court ordinarily does not interfere or disturb decisions of lower courts on issues of fact or evidence as received, considered and concurrently agree by the courts. That has been the position of this Court in many decisions including **Musa Hassani v. Barnabas Yahanna Shedafa (Legal Representative of the late Yohanna Shedafa)**, Civil Appeal No. 101 of 2018 (unreported), where this Court stated that:

> *"We are equally aware that on this third appeal, we should be very careful to meddle with the concurrent findings of fact of the lower courts, see: Maulid Makame Ali v. Kesi Khamis Vuai, Civil Appeal No. 100 of 2004 (unreported).* ***We are also aware that it is on very rare and exceptional circumstances the Court will interfere with findings of fact of a lower court."***
>
> [Emphasis added]

In this case however, we are obliged to interfere and disturb the findings of two of the lower courts for two reasons; **one,** because the findings of the three courts are not concurrent, whereas the District Court reversed the findings of the Primary Court, the High Court agreed with the latter court and reversed that of the District Court. **Two,** there was, at the High Court level, a complete misapprehension or a mix up of the evidence leading to a clearly wrong decision, as was observed in **Amratlal Damodar and Another v. H. Jariwala** [1980] TLR. 31. The two above stated points justify our intervention with the decision of the second appellate High Court. We shall, in a moment, demonstrate how the misapprehension of the evidence happened at the High Court.

At page 71 to 72 of the record of appeal, the second appellate High Court stated:

> *"By virtue of section 49(1)(2) and 75(1) of the Evidence Act Cap 6, in pari materia with section 73 of the Indian Evidence Act, and with the aid of the textbook on Law on Oral and Documentary Evidence by Gopal Chatuverdi bestowing the courts with powers to compare disputed documents and make findings accordingly in the event forensic is impossible or not forthcoming.* ***Evidently and by looks of things, the***

one from the respondent is doubtful likely a forged one.

All the said above, logic demands the truth that no one will stick for a lower claim while there is a possibility of reaping a larger amount as observed in the suit. The appellant demands for Tshs. 1,432,160/= only and not greedy for Tshs. 2,710,620/= allegedly by the Respondent. He is aware certain and satisfied with what he truly sold and, not overwhelmed by fictitious exorbitant figure by the Respondent. The trial court's decision is upheld as I overturn the District Courts findings."

[Emphasis added]

We will not deal with the first paragraph quoted above for two reasons. **One,** by section 19 (2) of the Magistrates' Courts Act [Cap 11 R.E. 2002, now R.E. 2019] read together with regulation 2 of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations 1964, G.N. No. 22 of 1964 (the PC Evidence Regulations), the Evidence Act [Cap 6 R.E. 2002, now R.E. 2019] referred to by the learned High Court Judge, is not applicable in Primary Courts and; **two**, a careful study of the statement shows that it is incomplete, hence incapable of comprehension.

We will analyse exhibits P1 and D2 in seeking to establish whether the High Court's assertion that exhibit D2 is the one which was likely to be forged, is justified. In respect of those exhibits, we have thoroughly inspected the original record of the Primary Court in Civil Case No. 33 of 2012 and the following are our findings; **one**, both exhibits are identical to one another in terms of size and content in every detail. **Two**, they are both a purchase payment voucher No. 2222405 dated 8th September 2012 evidencing that the respondent sold raw cotton weighing 4,107 kilograms worthy TZS. 2,656,620.00. **Three,** they both show that the above sum of TZS. 2,656,620.00 was paid after deducting TZS. 54,000.00 which was the cost for the advanced farm inputs. **Four,** the seller of the cotton is indicated to be Fita Tabu, the respondent who signed at an appropriate blank space left for that purpose in the document.

Although the documents (P1 and D2) have the same details on the front side, two remarkable differences between the two are loudly clear. They are; **first**, exhibit P1 is the original and D2 is a carbonated copy of the P1 and; **second,** exhibit P1 has hand written words at the reverse side, which are as follows;

"A. Kg. 2743 = 1810380/=
B. 1033 = 681780/=

= 3776 = 2492160/=
==========
15/10/2012 Fedha iliyobaki; 1492160
Sahihi ya Mlipwa; Fita Tabu.
Sahihi ya Mlipaji; sgd
C. Kg 249 = 164460.
==========″

These words, were on exhibit P1 which was tendered by the respondent. Exhibit D2 which was tendered by the first appellant did not have any unauthentic information, it had on its face, all the details like those on the front page of exhibit P1. In other words, the decision by the learned High Court Judge, that the document which seems to have been forged was D2 which was tendered by the first appellant has no credible support from the record. This is so because the High Court Judge did not point out any aspect of forgery on exhibit D2 in justifying that the document was forged. Conversely, the document which ought to have raised alarm in that respect, is exhibit P1 which had writings overleaf, which act, none of the parties wanted to associate himself with. In the circumstances, we are unable to agree with the learned High Court Judge that by looks of things, the exhibit which was likely to have been forged was the one which was tendered by the first appellant which is exhibit D2. The reason is that, the document did not have scribbles or any writings at the back or any unexplained details on it. It

was, therefore, unjustified for the High Court, in our view, to reverse the decision of the District Court based on the fact that exhibit D2 was forged.

There was yet another point. The learned Judge was also influenced by the fact that the appellant was demanding a lesser amount than that contained in exhibit P1. In our view, it is immaterial that the appellant, indicated to claim a lesser amount compared to that indicated in exhibits P1 and D2, the important matter for him was to prove existence of the sale transaction he was claiming to have been the basis of his case, which he did not do. In this case, the document he tendered supported the appellants' version of the case.

In conclusion of the first ground of appeal, we are of the firm position that: **first,** exhibit D2, being a valid document without any alterations, cancellations or any scribbles on its face or reverse side, the learned High Court Judge erred by holding that the document was most likely forged. In any event, the second appellate court did not give reasons for so holding. **Second**, the second appellate court was more or less speculative when it held that logically the respondent would not have claimed a lesser amount while the appellants were alleging to have paid him a larger sum of money. In this case instead of relying on logic, the learned High Court Judge ought

to have scrutinized the evidence in order to find out whether when the respondent sold the alleged 3,776 kilograms of cotton, he was given any purchase payment voucher, as was for each sale transaction of cotton, which the learned Judge did not do. In the circumstances, we find merit in the first ground of appeal and hereby allow it.

As for ground two, we tried as much as we could to underscore its import, but we must confess that we could not succeed. So, when parties appeared before us, particularly the appellants, they too, failed to remember their complaint in that ground. They explained further that they did not have any agreement with anybody, so they did not have any complaint regarding any agreement. In this appeal, the appellants did not lodge written submissions in support of that ground as provided for under rule 107 of the Tanzania Court of Appeal Rules, 2009 (the Rules), so that we could have made reference to the said submissions in an endeavour to understand their actual complaint. Similarly, as indicated above, the appellants were unable to exercise their right to submit orally in support of that ground of appeal as provided for under rule 107(10) (b) of the Rules. In the circumstances, we treat the second ground of appeal as abandoned by the appellants.

For the above reasons, the decision of the High Court is accordingly reversed and set aside. At the same time the decision of the District Court of Magu in Civil Appeal No. 11 of 2013 is hereby upheld, with further orders that this appeal is allowed and the respondent is to bear the costs.

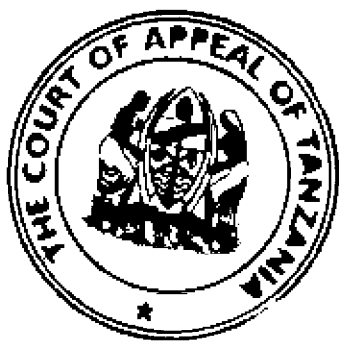
DATED at **MWANZA** this 12th day of May, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The judgment delivered this 12th day of May, 2022 in the presence of the 2nd appellant and respondent in person and in absence of the 1st appellant who reported sick, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL