IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB – REGISTRY OF MWANZA

AT MWANZA

CIVIL APPEAL NO. 9 OF 2022.

(Arising from Civil Appeal No. 22 of 2022 in the Geita District Court at Geita originating from Civil case No. 48 of 2021 in the primary court of Geita District at Katoro)

SILAS DAUD ..... APPELLANT

Versus

LEONARD NDONO ..... RESPONDENT

JUDGMENT

6th June & 11th July,2022

Kahyoza, J.:

Silas Daud appeals against a decree passed by the primary court and upheld by the district court, in favour of **Leonard Ndono** for paying the latter Tzs. 5,430,000/=. **Leonard Ndono** sued **Silas Daud** in the primary court claiming for unpaid loan of Tzs. 5,430,000/=. The pivot of parties' dispute is whether **Silas Daud** borrowed from **Leonard Ndono** Tzs. 5,430,000/= or the latter paid Tzs. 5,430,000/=to a third party to procure goods online and the former was just a go-between.

Silas Daud raised four grounds of appeal that-

1. That, the first appellate court erred in law by upholding the decision whose defence involved electronic evidence ending up abusing jurisdiction.

2. That, the first appellate court erred in law by upholding the proceeding which referred to exhibits not properly admitted by the trial court.
3. That, the first appellate court acted on bias by referring to boxes of items in its *ratio decidendi*, which were improperly admitted.
4. That, the first appellate court erred in law and fact by entertaining case whose proper party was not sued.
5. That, the first appellate court erred in law and in fact by improperly weighing the balance of probability thereby ending up defeating justice.

Leonard Ndono and **Silas Daud** were friends and co-workers. At one time before **Leonard Ndono** retired, both were teachers at the same school. **Leonard Ndono**'s story which both courts below believed is that after he retired **Silas Daud** approached him for a loan of Tzs. 10,000,000/=. **Leonard Ndono** declined. After **Silas Daud** visited him and spend a night at his house, **Leonard Ndono** and family members agree to advance Tzs. 5,430,000/= to **Silas Daud.** He added that they signed an online contract. **Leonard Ndono** deposed that **Silas Daud** promised to repay the loan in July. **Silas Daud** defaulted and instead of paying the loan delivered boxes to **Leonard Ndono** which did match the value of money advanced. He complained to police. On advice from police, he instituted the current suit in the primary court.

Silas Daud's tale was that he introduced **Leonard Ndono** to QNET, a company doing business on line. He entered online contract and procured goods, which were delivered to him. **Silas Daud** refuted the contention that, he borrowed from **Leonard Ndono.**

The trial court found **Leonard Ndono**'s story trustworthy and decided in his favour. I wish to point out at the outset that this case is based on

credibility of witnesses. There were no documents tendered as exhibits, not even a written contract, which parties alleged was executed.

Silas Daud, the appellant raised five grounds of appeal, two of which were not raised before the first appellate court. This is a second appeal, which has no mandate to decide on matters not canvassed by the lower courts. See **Simon Godson Macha** (Administrator of the late Godson Macha) v **Mary Kimaro** (Administrator of the late Kesia Zebadayo Tenga) Civil Appeal No 393/2019 **Juma Manjano v R.** Cr. Appeal No. 211/2009, **Sadick Marwa Kisase v. R**. Cr. App. No. 83/2012 and **George Mwanyingili V.** R. Cr. App. No. 335/2016. In **Juma Manjano v R.** the Court held-

> *"As a second appeal court, we cannot adjudicate on a matter which was not raised in the first appellate court."*

In the case of **Abdul Athumani v. R** [2004] T.L.R. 151 the issue of whether the Court of Appeal may decide on a matter not raised in and decided by the High Court on first appeal, was raised. The Court held that the Court of Appeal has no such jurisdiction. It stated-

> *"the Court has repeatedly held that matters not raised at the first appellate court cannot be raised in the second appellate court"*

The appellant contended in the first appeal that, the trial court erred in law by upholding decision whose defence involved electronic evidence ending up abusing jurisdiction. This ground was not raised before the trial court or before the first appellate, I will not attend it. If the appellant had based the first ground of appeal on a pure point of law, I would have considered it, as it is trite law that a point of law can be raised at any stage. The first ground of appeal is a mixture of law and facts. Not only that but also, a cursory review

of the appellant's evidence did not demonstrate that, the appellant or the respondent tendered electronic document. There is no electronic evidence on record. Thus, it is immaterial whether the trial court had jurisdiction to try a case involving electronic evidence or not.

The appellant raised another ground for the first time before this Court, a second appellate court that, the first appellate court erred in law and fact to entertain a case whose proper party was not sued. In support of the ground of appeal, the appellant's advocate submitted that, for the court to reach its decision there must be a proper party. He contended further that the appellant was not the one entered into the business with the respondent. He added that the respondent paid money to purchase boxes, which were delivered to him. He contended that receipts were issued by the third party. To support his contention, he cited the case of **Suryakant D. Ramji vs, Savings and Finance Limited and Others**, [2020] TLR 121.

The respondent replied through his advocate that he instituted a suit claiming for payment of money advanced as loan to the appellant. While defending the suit, the appellant brought new facts which did not relate to the suit for recovery of a loan.

As stated above, the appellant raised the issue of failure to sue the proper party for the first time before this second appellate court. I reviewed the evidence to find out who is the proper party, which the respondent ought to have joined, unfortunately I could not find any. The appellant's evidence was that the respondent went to the appellant's office where he was trained how to conduct business online. After training, the respondent withdrew

money and the appellant and respondent commenced the process of conducting online business. I quote-

> *".. nilimsidikiza hadi nyumbani kwake akaitisha kikao nyumbani kwake akawaeleza mke wake akasema kabla ya hatujaridhia labda na sisi twende tukapata hayo mafunzo ndipo asubuhi yake tukaongozana nao wote hadi ofisini kwetu mke wake na kijana wake wakapata mafunzo yote baadae waridhia wote kwa pamoja kwanza baiashara wakaenda bank an kutoa fedha ndipo tukaanza zoezi la kuuza vifaa kwa njia ya mtandao ndipo pesa yao ikabadilishwa kwa dolla akaanza biashara..."*

The above evidence does not depict who was a third party. The appellant did not specify the name of the office he was working for. It is not clear whether the appellant was an employee, an agent or a person owning the company which was trading with the respondent. There is no evidence that there was proper party who was not sued. Even if, such a party existed the appellant had a duty to join him through a third-party procedure. Further still, the issue of non-joinder ought to have been raised at the easiest point in time.

In fine, I do not find merit in the fourth ground of appeal for reasons that, the issue of failure to join the proper party was not raised and canvassed by either the trial court or the first appellant court and there is no evidence to show that, there existed a party so important that failure to join him led to miscarriage of justice. Not only that but also if that person existed there was no proof of the relationship between the appellant and that other person. There is no evidence to prove that the appellant was authorized to conduct

business on behalf of that person. I am alive of the position of the law that authority of an agent may be implied or express. See section 138 of the Law of Contract, [Cap. 345 R.E. 2019]. There is nothing to suggest that the appellant was acting for and on behalf any other person.

In addition, I join the respondent's advocate submission that the respondent sued the appellant for recovery of a loan. If the appellant had reason to believe that the relationship between him and respondent was not that of borrower and lender relationship, but of seller and buyer relationship, the appellant being an agent of the certain company, was bound to tender evidence to establish that relationship. There is no such evidence. I therefore, find no merit in the fourth ground of appeal. Consequently, I dismiss it.

I will now consider the second ground of appeal, where the appellant complained that the first appellate court erred in law by upholding the proceedings, which referred to exhibits not properly admitted by the trial court. The appellant's advocate submitted that the first appellate court referred to exhibits not properly admitted by the trial court. He argued that it is trite law that an exhibit is required to be properly admitted, annexed with a specific name, or signed and endorsed with specific reference. He cited the case of **M/S Transami (Tanzania) Limited vs. M/S STE DATCO** Civ. Appeal No. 16/2021 CAT (unreported).

The respondent's advocate replied that looking at the records neither trial court nor the first appellate court rendered the decision by referring to exhibits which were not tendered during trial or improperly tendered. Rather the first appellate court referred to the appellant's advocate's argument who was trying to establish that the respondent purchased online products.

I agree with the appellant's advocate that, it is a trite law that, to form part of the record, exhibits must be tendered, cleared for admission, admitted and properly marked. A cursor review of the proceedings of the trial court reveals that the trial court did not admit any exhibit. Thus, if there was reference to any exhibit in either the judgment of the trial court or that of the first appellate court then that is an error on the record. The remedy is to expunge the exhibit, which the trial court did not properly admit and still relied on it to make its decision. It is trite law that judgment of court must be grounded on the evidence properly adduced during trial otherwise it is not a decision at all. (See **Shemsa Khalifa and Two Others vs. Suleiman Hamed**, Civil Appeal No. 82/2012).

I examined the appellate court's judgment and found that nowhere did it refer to any exhibit in its reasoning. The first appellate court's judgment referred to the empty cases of boxes. It is true that boxes were not tendered as exhibit but there was oral evidence making a reference to boxes. Not only that but also the first appellate court's reference to empty boxes was an *obiter dictum*. It was a statement made in passing not the bases of its judgment. It was not central in determining the appellant's liability. I will produce the statement for the sake of clarity. The appellate court stated-

> *"As stated earlier the respondent (Silas Daud) entered into a loan agreement knowing the appellant (Leornard Ndono) would return the money. Unfortunately, the respondent received empty cases of boxes. This piece of evidence is not new and the same form part and parcel of the trial court proceedings."*

It is a fact that the evidence that, the respondent received empty cases of boxes was part of the evidence before the trial court. The respondent and his witness made a reference to empty boxes. They stated-

> *Leonard Ndono (**Pw1**) ....mwezi wa 7 ilipofika akabadili lugha na kusema atalipa kwa mafao kwamba akawa ameniingiza kwenye biashara ambayo sikuwa na faida nayo na siijui. **Baadae akanipa makasha ambayo hayakuwa na faida na mimi wala hayakuwa na** **thamani**.." (Emphasis added)*

The respondent's witness testified that-

> *Thereza **(Pw2)** baadae mme wangu ndipo akaja na maboxi tarehe 06/01/2020."*

Given the evidence on record, the first appellate court's reference to empty boxes was not referring to exhibits but to oral evidence. It was justified to refer to oral evidence and rely on it provided it came from credible witnesses. I find no merit in the second ground of appeal, hence I dismiss it.

Another ground of appeal to consider is the third ground of appeal, where the appellant complained that the first appellate court acted on bias by referring to *boxes of items* in its *ratio decidendi*, which were improperly admitted. He submitted that it is on face of records that while holding the evidence tendered by the appellant as improperly admitted, the same appellate court referred to boxes improperly tendered in its *ratio decidendi* at page 9 of the judgment.

The respondent's advocate refuted the allegation that there was any judicial bias. He submitted that the appellant did not adduce reasons to substantiate bias on the part of the appellate magistrate.

I will not dwell on this ground of appeal as while answering the second ground of appeal I discussed the issue whether the first appellate court relied on exhibits not properly admitted. The reply was that it did not consider exhibits not properly admitted. It considered oral evidence that the appellant delivered to the respondent empty boxes. It is vividly clear that no party tendered boxes as exhibit and the first appellate court never made a reference to empty boxes as exhibits. I do not find merit in the third ground of appeal. I accordingly dismiss it.

The last ground of appeal is that the first appellate court erred in law by improperly weighing the balance of probability thereby ending up defeating justice. The appellant's advocate submitted that the respondent had the evidential burden to prove his allegation. He stated the respondent's claim in the trial court is what not really happened between the parties; the version of the defence juxtaposed during trial contained a number of exhibits and photographs. If the trial court was able to refer to them, they had to be weighed against oral evidence of the respondent; that was not done. He referred to the case of **Barella Karangirangi vs. Asteria Nyalwambwa** Civil Appeal No. 237/2017(CAT-unreported) regarding the role of a court to weigh the evidence. He stated that there were pictures showing the respondent receiving the products, therefore the fact about loan really did not exist and ought to be counted as zero proof.

The respondent's advocate submitted that oral evidence on record depicts that the respondent proved his case on the balance of probability. He contended that the respondent proved that the appellant borrowed Tzs. 5,430,000/= which he had promised to refund. He added that the appellant failed to object to the factual claim.

The last ground of appeal intends to move this court to consider the evidence on record to find out if the first appellate court and the trial court properly weighed the evidence on record. It is trite law that, *where there are concurrent findings of facts by two courts, the second appellate, as a wise rule of practicing, should not disturb them unless it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure. (*See the case of **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores Vs. A.H Jariwalla tla Zanzibar Hotel** [1980] T.L.R 31.)

This is a second appellate court, which can only interfere with the findings of facts of two courts below only on limited circumstances. The appellant's advocate did not prove that the two courts below wrongly evaluated the evidence or that there has been *a misapprehension of evidence.* The appellant's advocate contended that the evidence which the trial court and the first appellate courts omitted to consider were photos, one of which showed the respondent receiving procured products. I regret to inform the appellant's advocate that the trial court's record did show that there was any exhibit tendered and admitted. The first appellate court cannot be faulted for not considering the evidence, which was not on record. I have no reason to

interfere with the concurrent findings of the two courts below as their analysis did not occasion any injustice or miscarriage of justice.

In fine, I find the appeal without any merit. Consequently, I dismiss the appeal with costs. I uphold the decree of first appellate court.

It is ordered accordingly.

Dated at **Mwanza** this 11th day of July, 2022.

J.R. Kahyoza

JUDGE

11/07/2022

Court: Judgment delivered in the virtual presence of the applicant and respondent, though it was a difficult to read the judgment fully due to poor connection. Parties may obtain a copy of the judgment at their convenience from today. B/C Ms. Jackline (RMA) present.

J.R. Kahyoza

JUDGE

11/07/2022