IN THE HIGH COURT OF TANZANIA

[DODOMA DISTRICT REGISTRY]

AT DODOMA

PC CIVIL APPEAL NO. 10 OF 2020

[Arising from a decision of the District Court of Dodoma at Dodoma in Civil Appeal No. 31 of 2019 which originated from Chamwino Mjini Primary Court in Civil Case No. 164 of 2019]

HUSSEIN JUMA ..... APPELLANT

VERSUS

FAROUK MOHAMED ..... RESPONDENT

JUDGMENT

22nd April, 2020 & 11th August, 2020

M.M SIYANI, J

Farouk Mohamed, the respondent herein was the plaintiff at the trial primary court. He sued Hussein Juma (the appellant) for the sum of Tshs 42,300,000/= being the amount paid as a purchase price of a house (Tshs 23,000,000/=), loss incurred (Tshs 9,000,000/=) and general damages (Tshs 10,000,000/=). The trial court's record, shows the appellant admitted the claim at the tune of Tshs 21,300,000/=. Upon a full trial, the court

entered judgment in favour of the respondent and awarded him the whole claimed sum of Tshs 42,300,000/=.

Aggrieved by the trial court's decision, the appellant preferred his first appeal to District Court of Dodoma which reduced the amount awarded by trial court to Tshs 30,300,000/=. Still aggrieved, Hussein Juma is now in this temple of justice to challenge the lower court's decision His petition of appeal contains the following three grounds of complaints.

1. *That the trial Magistrate erred in law and in fact by delivering judgment in favour of the respondent herein basing on weak, contradictory and nugatory evidence adduced by the respondent.*
2. *That the trial Magistrate erred in fact and in law for deciding in favour of the respondent herein while failing to evaluate strong evidence adduced by the appellant.*
3. *That the trial Magistrate erred in law and in fact by holding and issuing judgment basing on the facts which does not exist from the parties.*

Neither of the parties had legal representation at the hearing of the instant appeal. Given a chance to address the court, both the appellant and the respondent merely adopted the contents of the respective grounds of appeal and reply thereof to be their submissions. The appellant went further to add what appears to be a third ground of appeal by faulting the trial court for failure to consider his evidence on who between the two breached the contract.

As noted earlier, this is a second appeal against a decision of the trial court. There are two established principles of law with regard to what a second appellate court can do. One is that a second appellate court should only be enjoined to deal with issues of law and not facts. Two; a second appellate court can step into the shoes of the lower court on issues of facts pleaded and determined by the courts below, only where the said facts were not a subject of a concurrent findings unless there is a poof of misapprehension of evidence leading to miscarriage of justice.

I am fortified on the above positions with the following decisions from the apex court of our land. First; the case of **Seleman Rashid @ Daha Vs Republic** Criminal Appeal No. 190 of 2010 and second; **Bihani Nyankongo**

& Another Vs Republic Criminal Appeal No.182 of 2011 (both unreported) where the Court of Appeal of Tanzania observed the following:

> *The Court has on several occasions held that a ground of appeal not raised in first appeal cannot be raised in a second appeal.*

Similar stance was taken by the same Court in **Kennedy Owino Onyango & others Vs Republic,** Cr App no 48/2006 when the following was stated:

> *Again as a matter of general principle an appellate Court cannot allow matters not taken or pleaded and decided in the court (s) below to be raised on appeal.*

With regard to the duty of the second appellate court to refrain from disturbing concurrent findings of facts, the Court of Appeal of Tanzania cemented the following in **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores Vs A.H Jariwalla t/a Zanzibar Hotel** (1980) TLR 31:

> *Where there are concurrent findings of facts by two courts, the Court of Appeal, as a wise rule of practice 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.

Again, the same court stated the following in **Samwel Kimaro Vs Hidaya Didas,** Civil Appeal No. 271 of 2018:

Nonetheless, both the trial Tribunal, after hearing the evidence ruled that the appellant had knowledge and the High Court, after reviewing the evidence of the trial Tribunal arrived at the same conclusion that the appellant was aware of rent increase. As such, the question whether the appellant was notified orally or through formal written notice, is purely based on facts and not law. This being a second appeal, we refrain in interfering with lower court's concurrent findings of fact.

Having set the position of the law with regard to second appeals; I have gone through the records of both the trial court and the first appellate court. It is in record that when cross examined by the respondent on 23rd May 2019, the appellant admitted a claim to the tune of Tshs 21,300,000/=. For easy of reference the appellant stated the following in Swahili:

Mimi natambua deni la Tshs 21,300,000/=.
Sikumbuki kuongezewaTshs 2,000,000/=.....
Ananidai Tshs 21,000,000/= kama sehemu ya manunuzi ya nyumba ya Tshs 25,000,000/=.

Basing on such admission and the contents of a contract between parties herein which was tendered in court and admitted as exhibit MF2, both the trial court and the first appellate court had a concurrent finding that indeed, there was contract between the parties and the respondent was entitled to Tshs 23,300,000/= plus general damages. However while the trial court assessed and awarded the sum of Tshs 10,000,000/= as general damages, the first appellate court reduced the said amount to Tshs 7,000,000/=. That notwithstanding it remains established that both two courts below concluded that the respondent was entitled to principal sum claimed plus general damages.

In my view therefore, since there was a concurrent finding of fact; and the appellant has not pointed out any misapprehension of the same, the principle set in **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores Vs A.H Jariwalla t/a Zanzibar Hotel** and **Samwel Kimaro Vs Hidaya Didas** (supra) applies squarely in the instant appeal. This being a

second appeal, I refrain from interfering with lower courts concurrent findings of fact.

The above said, the appellant had three grounds of appeal presented at the first appellate court which are different from the ones raised in this court. As a result, the grounds of appeal advanced in this court were not dealt with by the first appellate court. I wish to subscribe myself to the binding authorities in **Seleman Rashid @ Daha Vs Republic**; **Bihani Nyankongo & Another Vs Republic** and **Kennedy Owino Onyango & others Vs Republic** (supra) that ground of appeal not raised in first appeal cannot be raised in a second appeal.

In the fine, all the three grounds of appeal raised in this court are on facts and not points of law. For a second appellate court to entertain the same, the appellant ought to show that there was misapprehension of facts which has resulted to miscarriage of justice. Nothing as far as misapprehension of evidence was shown by him during of the appeal. All that remains in record, is that the appellant admitted the claim on the principal sum which justified its award. Moreover, there was no ground of appeal on general damages which apparently its award is on the discretion of the court.

In conclusion, the present appeal originates from a civil suit whose standard of proof, is on the balance of probabilities. That means that courts of law will always accept evidence which is more credible and probable (See **Al-Karim Shamshudin Habib Vs Equity Bank Tanzania Limited & Viovena Company Limited,** Commercial Case No. 60 of 2016); **Wolfgango Dourado Vs Toto Da Costa,** Civil Appeal No. 102 of 2002 and **Antony M. Masanga Vs Penina (Mama Mgesi) & Lucia (Mama Anna),** Civil Appeal No. 118 of 2014**,** (unreported).

The above said I find no reason to fault the decision of the first appellate court which is now upheld. Accordingly, I find no merit in this appeal and I proceed to dismiss it with costs. It is so ordered.

DATED at **DODOMA** this 11th day of August, 2020

M.M. SIYANI

JUDGE