IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWANGESI, J.A., KWARIKO, J.A. And KEREFU, J.A.)

CIVIL APPEAL NO. 114 OF 2014

SHEAR ILLUSIONS LIMITED ..... APPELLANT

VERSUS

CHRISTINA ULAWE UMIRO .....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania Commercial Division at Dar es Salaam)

(Makaramba, J)

dated the 18th day of December, 2013

in

Commercial Case No. 32 of 2012

JUDGMENT OF THE COURT

07th & 20th November, 2019

KEREFU, J.A.:

This appeal arises from the judgment and decree of the High Court of Tanzania, Commercial Division at Dar es Salaam (Makaramba, J) dated 18th December, 2013 in Commercial Case No. 32 of 2012. In that case, Christina Ulawe Umiro, the respondent herein sued Shear Illussions Limited, the appellant herein for payment of a sum of TZS. 58,187,000/= on account of the outstanding balance in respect of various hair products

sold, supplied and delivered to the appellant. The respondent also claimed for the payment of interest, damages and costs of the suit. In her defence, the appellant prayed for the dismissal of the suit on the grounds that, the purchase price was not due for payment, because payment was agreed to be paid by daily or weekly deposits in the respondent's account from the appellant's sales of goods.

However, at the end, the learned trial Judge decided the suit in favour of the respondent, where the appellant was ordered to pay TZS. 54,093,000/= being the principal outstanding amount, the interest on the said decretal sum at a court's rate of 7% per annum from the date of judgment till final payment and the costs of the suit. Aggrieved, the appellant lodged this appeal. In the Memorandum of Appeal, the appellant has raised seven (7) grounds of appeal that:-

1) *The learned trial Judge erred in law and fact by holding that the issue of description of the goods is not vital;*
2) *The learned trial Judge erred in law and fact by holding that the appellant cannot reject the goods delivered;*

3) *The learned trial Judge erred in law and fact by holding that the purchase price was payable immediately in doing so he failed to take into account the conduct of the parties;*

4) *The learned trial Judge erred in law and fact in failing to take into account evidence that 495 pieces of the hair were collected by the respondent after being rejected;*

5) *The learned trial Judge erred in law and fact in holding that exhibit P1 was an invoice for payment of purchase price;*

6) *The learned trial Judge erred in law and fact in holding that the agreement between the parties was for the purchase price to be paid immediately upon delivery of the goods in doing so he failed to take into account the input of exhibits P2 and P3; and*

7) *The learned trial Judge erred in failing to hold that the parties had agreed for payment to be made on installment from the sale of the goods.*

The essential facts of the matter obtained from the record of appeal indicates that, between 12th December, 2010 and 23rd October, 2011, the respondent sold, supplied and delivered on credit various hair products to the appellant valued at a total sum of TZS. 68,187,000/=. The appellant

was required to pay the purchase price immediately after delivery of the said goods by depositing the money at the plaintiff's bank account No. 01J2093996600 held at the CRDB Bank or issuing a cheque in favour of the respondent. Out of the total sum of TZS. 68,187,000/=, the appellant managed to pay TZS 10,000,000/= only by depositing TZS 8,000,000/= at the respondent's account and issuing a cheque of TZS. 2,000,000/=. These were paid prior to the institution of the suit. After the institution of the suit and in the course of the trial, the appellant had also deposited to the respondent's account TZS 2,000,000/= leaving a balance of TZS 54,093,000/= which remained unpaid. The respondent has persistently demanded payment of the said monies from the appellant, but the appellant has failed, refused, neglected and/or ignored to pay the said balance.

When the appeal was placed before us for hearing, both parties were represented. Mr. Gaspar Nyika, learned counsel, entered appearance for the appellant, whereas Mr. George Kato Mushumba, also learned counsel, represented the respondent. The said learned counsel had earlier on lodged their respective written submissions and reply written submissions

in support of and in opposition to the appeal, which they sought to adopt at the hearing to form part of their oral submissions, without more.

In the written submissions in support of the appeal, Mr. Nyika prayed to abandon the first and the second grounds of appeal and argue the third and six grounds jointly.

In arguing the third and six grounds of appeal, Mr. Nyika faulted the learned trial Judge for holding that the purchase price was payable immediately. He argued that, since the relationship between the parties was governed by an oral agreement, the question as to how and when the payments were to be paid could have been ascertained from the parties' conducts. He referred us to section 30 of the Sale of Goods Act, Cap. 214 R.E. 2002 (the Sales of Goods Act), where the time for payment of unspecified agreement is immediately upon delivery of goods and disputed that, the same is not applicable in this matter, because due to the conducts and oral agreement between the parties, the payment was to be made through daily or weekly deposits into the respondent's account, *'payment-as-you-sell-basis.'*

Mr. Nyika further referred us to the testimony of Shekha Nasser (DW1) and exhibit P2 and argued that, the testimony of DW1 was never challenged by the respondent during the cross examination. In the same line of argument, he referred us to the testimony of Christina Ulawe Umiro (PW1), who he said, had since admitted at pages 86-87 of the record of appeal that, the payment was to be made in piecemeal on the goods supplied and delivered. Amplifying on this point, Mr. Nyika argued that, all along the appellant had been effecting daily and/or weekly payments to the respondent's account and the same have never been questioned by the respondent. He further argued that, the issue of immediate payment was raised by the respondent, when the appellant claimed that, the goods delivered were not in accordance with the agreed specifications. As such, Mr. Nyika prayed the Court to find out that, the learned trial Judge was wrong to order for immediate payment of the outstanding balance, when the goods were still lying in the appellant's shelves.

In respect of the fourth ground, Mr. Nyika submitted that, the learned trial Judge failed to take into account that, 495 hair pieces were collected by the respondent after being rejected by the appellant. To support his argument he referred us to the testimony of DW1, who

testified that, out of 1000 hair pieces supplied, 495 pieces were collected by the respondent. Mr. Nyika submitted further that, the learned trial Judge did not make any finding on this fact in determining the balance to be paid to the respondent after she had collected the said pieces.

Regarding the fifth ground, Mr. Nyika submitted that, exhibit P1 tendered by PW1 before the trial court was only a piece of paper which does not qualify to be termed as an invoice, as decided by the learned trial Judge. He submitted further that, the usual sections on invoice include date, names and addresses of customer and supplier, descriptions of the items purchased, either products supplied or services rendered and terms of payments. He referred us to the Black's Law Dictionary, 6th Edition where an '*invoice*' is defined to mean:-

> *"...a written account, or itemized statement of merchandise shipped or sent to a purchaser, consignee, factor, etc, with the quantity, value or prices and charges annexed and may be as appropriate to a consignment or a memorandum shipment as it is to a sale."*

Mr. Nyika submitted that, since all documents contained under exhibit P1 do not indicate the name of the customer to whom the items

were directed, dates, descriptions of the goods and modes of payments, it was wrong for the learned trial Judge to admit the same as an exhibit despite the objection raised on its admissibility and authenticity. He added that, exhibit P1, which was tendered by PW1 was a secondary evidence (a photocopy) and the learned trial Judge admitted it without observing the mandatory procedures of admitting secondary evidence under section 67 (1) of the Evidence Act, Cap. 6 R.E 2002 (the Evidence Act). Mr. Nyika argued further that, the admission of exhibit P1 was prejudicial to the appellant, because she was found liable due to those doubtful documents. As such, Mr. Nyika prayed the Court to find out that the decision of the learned trial Judge to admit exhibit P1 and later name it as invoices was erroneous.

On the last ground, Mr. Nyika faulted the learned trial Judge for failing to hold that, payments were made by installments as evidenced by exhibit P2 tendered by PW1. Finally, he prayed the Court to find that, the agreement between the parties was for the payments to be made by installments, and not immediately after delivery of goods as decided by the learned trial Judge. On the strength of the above argument, Mr. Nyika

urged us to reverse the decision of the trial court and allow the appeal with costs.

In response, Mr. Mushumba resisted the appeal. Disputing what was submitted by Mr. Nyika on the third and sixth grounds of appeal, Mr. Mushumba referred us to the testimony of PW1 and argued that, PW1 never admitted that the payments were supposed to be made on daily or weekly basis or even '*payment-as-you-sell-basis.*' He argued that, PW1 said that the payment was by piecemeal, which meant payment was per the products supplied and delivered. That, products supplied and delivered were to be paid immediately upon delivery. Mr. Mushumba further challenged the testimony of DW1 before the trial court for failure to provide evidence to prove the time frame of payment she claimed.

He as well challenged the submission by Mr. Nyika that, conducts of the parties could have been considered as an agreed time frame for payment i.e by daily and/or weekly deposits. He said, even exhibits P1, P2 and P5 do not support that claim, as in those documents deposits were made by the appellant on different dates at her own imposed mode which was never agreed upon by the parties. It was the strong argument of Mr.

Mushumba that, due to the fact that parties entered into an oral agreement and there was no specific time frame for payment of the purchase price agreed upon, the learned trial Judge was justified to invoke the provisions of section 30 of the Sale of Goods Act, in the circumstances. As such, he invited the Court to find that the third and sixth grounds of appeal have no merit.

On the fourth ground, Mr. Mushumba argued that, though, the appellant alleged that the respondent collected 495 hair pieces, she failed to prove that fact with concrete evidence. He said, that is why the learned trial Judge did not consider the said fact. It was therefore the view of Mr. Mushumba that, the learned trial Judge was justified not to consider that fact, as it remained to be only a mere statement.

With regard to the fifth ground, Mr. Mushumba conceded to the definition and the meaning of an invoice availed by Mr. Nyika. He however argued that, after abandoning the first and the second grounds of appeal, exhibit P1 is also redundant, as the appellant is no longer disputing issues of delivery of the said goods, quantity and pricing, but only the mode of

payment. In conclusion, Mr. Mushumba invited the Court to find that the entire appeal has no merit and should be dismissed with costs.

On our part, having examined the record of appeal and considered the submissions made by the counsel for the parties, the issue to be considered by the Court is whether the appeal by the appellant is founded. In answering the said issue, we wish to start by stating that, we have noted that, in the course of arguing the grounds of appeal, Mr. Nyika has prayed to abandon the first and second grounds of appeal, which were in relation with issues of sale, delivery and description of the goods. Abandoning the said grounds, as eloquently argued by Mr. Mushumba, means that, issues related to sale, delivery and descriptions of the goods are no longer in dispute. It is also on record that Mr. Nyika did not rejoin on that aspect and therefore, the first and second grounds of appeal are marked as such. Mr. Nyika also prayed to argue the third and sixth grounds jointly. Therefore, in considering the merits or demerits of the remaining grounds of appeal raised by the appellant, we will consider them seriatim in the same way they were argued by the counsel for the parties.

Starting with the third and sixth grounds, we wish to note that, there is no dispute that the relationship between the appellant and the respondent was regulated by an oral agreement. We have also noted that, due to the said oral agreement parties were at variance on when exactly the payment of the purchase price was to be made. Mr. Nyika submitted that, parties agreed that payments would be made by *'daily or weekly'* deposits into the respondent's account. It was the further view of Mr. Nyika that, the same could be established from parties' conducts evidenced by exhibit P2. He as such, faulted the learned trial Judge to invoke the provisions of section 30 of the Sale of Goods Act and find that the appellant was required to pay the respondent immediately after delivery of the goods. On his side, Mr. Mushumba argued that, it was proper for the learned trial Judge to invoke the said section, because deposits were made on different dates at the self-imposed mode and timing by the appellant.

For the purposes of establishing the agreed time of payment of the purchased price for the goods delivered to the appellant, we have travelled through the testimonies of PW1 and DW1 together with their correspondences and we are in agreement with the learned trial Judge,

that there was no specific agreed time frame for payment between the parties. Parties were at variance on when exactly the payment should be made. For avoidance of doubt, we have reproduced what PW1 and DW1 testified before the trial court, herein below:-

PW1 testified that:-

> *"I live at Ilala, I am a business woman, I have a shop at Samora, I deal with hair and cosmetics. I have wholesale company, which distribute the goods. Shear Illussions since 2006 -2011 have been doing business with us. They were placing orders for hair and cosmetic products from USA...since the beginning we were doing business smoothly, but she did not pay me well. She sent emails on products and I gave her the price wanted to have. On 12/12/2010 I brought products worth TZS. 5,588,000/= as per the delivery Note No. 0377. Thereafter, on 01/06/2012 I supplied the products worth TZS. 12,032,000/= as per invoice No. 0040. On 01/08/2011 I bought a container worth TZS. 48,473,000/=. The total price of the products supplied worth TZS. 68,187,000/=. I have the invoices which Shelina Nasser, the Director of Shear Illusions,*

*signed...**The agreement was that, when I bring products and sign invoices, she pays immediately, even haif of it and the balance paid into my account at the CRDB which I opened purposely for that purpose,** as I was studying in the USA. The payment was either by cheque or by depositing the money into my account..." [Emphasis added].*

Upon cross- examination on this matter by Mr. Nyika, PW1 testified that, ***"Payment has been made in piecemeal even after filing the case."*** *[Emphasis added].*

On the other side, DW1 testified that:-

> *"I deal in beauty and cosmetics buslness since 2005. I know Christina Ulawe Umiro for we were doing business jointly as friends and help each other. She brought stuff to my shop, sell and I deposit money in her account at 30% commission as profit...she brought 1000 pieces...**I have paid more than TZS. 12,000,000/= to her. After the case I paid TZS. 17,000,000/= of which TZS. 5,000,000/= was for previous supply...payment was on 'as I sale basis'..."***

From the above testimonies, it is clear that parties were at variance on the time of payment. While PW1 said, payments were supposed to be made *immediately after delivery of goods*, DW1 believed that, it was on '*as I sale basis'.* We have also examined '*parties conducts'* as suggested by Mr. Nyika together with exhibits P1, P2, P3 and P5, to see if the same can shed lights on the matter. Unfortunately, the said exhibits do not support such contention and cannot bail out the appellant, as the deposits were made on different dates and periods. By the testimonies of the parties, TZS 2,000,000/= was even paid to the respondent on 04th October, 2011 one year after delivery of the goods and filing of the case at the High Court. By any means, the said *'parties conducts'* cannot justify the claim by the appellant that payments were agreed to be paid daily or even weekly. In the circumstances, we find that, it was correct for the learned trial Judge to invoke the provisions of section 30 of the Sale of Goods Act. That said, we dismiss the third and sixth grounds of appeal for want of merit.

As for the fourth ground, the issue is whether out of 1000 hair pieces delivered to the appellant, 495 pieces were later re-collected by the respondent. The appellant is blaming the learned trial Judge for failure to

consider this fact and deduct the price of the collected pieces in his final decision. It is on record that, although the appellant claimed that, after she refused to keep the said goods in her shop, she requested the respondent to collect them and said the respondent collected 495 hair pieces, in her testimony before the trial court, DW1 ended up contradicting herself, as indicated at page 107 of the record of appeal, where she testified that:-

> *"...I asked her to come and collect her stuff. She collected 495 pieces out of 1000 pieces. I asked her to let me keep and continue to sell them at reduced price from TZS 35,000/= to TZS. 30,000/=, but still could not sell and I asked her to come up and pick them up... The products are still in my shop."*

It is on record that, all these information adduced by DW1 before the trial court was not supported by concrete and tangible evidence to prove the said facts. It is a settled principle of the law that, "*he who alleges must prove the allegation*". Section 110 (1) of the Evidence Act provides that:-

> "***Whoever desires any Court to give***

judgement as to any legal right or liability dependent on existence of facts which he asserts must prove that facts exist." [Emphasis supplied].

In addition, it is clear from the above reproduced paragraph from the DW1's testimony that, her testimony is tainted with contradictions and inconsistencies. We are mindful of the principle that, the learned trial Judge was expected to consider the said contradictions and determine if they go to the root of the matter. It is our finding that, the said contradictions above touched the root of the matter. It is our respectful view that, even if the same could have been considered by the trial court, would not have changed the decision reached. We therefore wish to refer to the previous decision of this Court in **Emmanuel Abrahamu Nanyaro v. Peniel Ole Saitabu** [1987] T.L.R 47 where it was clearly stated that, unreliability of witnesses, conflicts, inconsistencies in their evidence entitle a judge to reject their evidence. It is therefore our settled view that, since the testimony of DW1 is tainted with contradictions and she also failed to substantiate her allegations with concrete evidence, the learned trial Judge was justified to ignore her testimony on that fact, as the same remained to

be a mere statement with no any evidential value. We therefore find no merit in the fourth ground of appeal and it is also dismissed.

As regards the fifth ground, among others, the issue raised by Mr. Nyika is the admissibility of exhibit P1 and the same to be named as an invoice. It is common ground that, the main purpose of an invoice is to prove that an agreement was entered between the parties, the service was rendered and/or goods have been delivered as requested, received and payment is required. Now, as we have indicated above, after abandonment of the first and second grounds, issues related to sale, delivery and descriptions of the goods are no longer in dispute. As such, we are in agreement with Mr. Mushumba that, the fifth ground is superfluous and the same should not detain this Court. Accordingly, the fifth ground of appeal is as well found to be obsolete and, we accordingly dismiss it.

As for the seventh ground on the claim by the appellant that payments were to be made by installment, the same has already been answered when we considered the third and the sixth grounds above. Likewise, the seventh ground is also with no merit.

In view of the aforesaid, we find the entire appeal to be devoid of merit and it is hereby dismissed with costs.

DATED at **DAR ES SALAAM** this 15th day of November, 2019.

S. S. MWANGESI
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 20th day of November, 2019 in the presence of Mr. Kyariga N. Kyan'ga holding brief for Mr. Gasper Nyika, for the Appellant and Mr. Derick Kahigi holding brief for Mr. George Mushumba for the Respondent. Is hereby certified as a true copy of the original.

H.P. Ndesamburo
DEPUTY REGISTRAR
COURT OF APPEAL