

TANZANIA / JUDGMENT

JUDGMENT Kazembe Said Kazembe

COURT
TANZLII

DECIDED
28 November 2024

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA SONGEA SUB-REGISTRY AT SONGEA PC. CIVIL APPEAL NO. 16054 OF 2024 (Arising from Tunduru District Court in Civil Appeal No. 9154 of 2024, Original Civil Case No. 114 of 2024 from Mlingoti Primary Court) KAZEMBE SAID KAZEMBE APPELLANT VERSUS DEOGRATIUS MAPUNDA RESPONDENT

JUDGMENT

28th November 2024 & 4th February, 2025. KAWISHE, J.: This is a second appeal. The first attempt was made before Tunduru District Court (the first appellate court) vide Civil Appeal No. 9154 of 2024 after been dissatisfied with the decision of Mlingoti Primary Court in Civil Case No. 114 of 2024. Still dissatisfied with the decision of the first appellate court, the appellant has preferred an appeal before this court. His appeal is premised on the following grounds: 1

1. That the District Court erred in law and facts in coming out with a new issue (i.e failure of the respondent to take oath) and substantially relied on it in determining the appeal without affording the parties an opportunity of addressing court on it, a fact which not only violated the rules of natural justice but also led to miscarriage of justice.
2. That the District Court misdirected itself in law and in fact by, on one hand, holding that it has expunged from records the entire respondent’s testimony whereas, on the other hand relying on the same respondent’s testimony in deciding the appeal in favour of the respondent.
3. That much as it is undisputed that first appeal is in the nature of retrial, the District Court erred in law and in fact in effectively putting words in the mouth of the respondent so as to afford him a defence which he himself never imagined of. Basing on the above grounds of appeal, the appellant prayed for this appeal to be allowed and the respondent be ordered to pay the costs. Before dwelling into the discussion of the grounds of appeal, I find it pertinent to provide in an albeit briefly, the facts leading to this appeal. They go as follows: Before Mlingoti Primary Court (the trial court), the appellant sued the respondent claiming to be paid TZS. 7,550,000.00, as the value of 290 bags of sulphur supplied to the respondent by the appellant. The respondent denied the claim but after full trial the trial court found the appellant has proved his claim at the tune of TZS. 2,990,000.00 only. His appeal before the

first appellate court was partly allowed and the 2 respondent was ordered to pay the appellant only 1,850,000.00. Still dissatisfied, he has knocked the doors of this court on the above grounds of appeal. In this appeal, both parties were represented. The appellant was represented by Mr. Edson Mbogoro, learned advocate whereas the respondent had the legal services of Mr. Yusuph Kaukuya, learned advocate. By the parties' consent, this appeal was disposed of by way of written submission. Both parties adhered to the submission orders scheduled by this court. Arguing in support of the first ground of appeal, the appellant's advocate submitted that, the first appellate court erred when it raised a new issue and decided it without affording the parties with an opportunity to address on the same. He amplified that, having found the irregularity in the trial court's proceedings that, the respondent gave his testimony without taking oath, it proceeded to expunge the evidence given by the respondent. He added that, though the first appellate court has power to do so, but it must invite the parties to address on the same before making its decision. To bolster his stance, he referred this court to the decision 3 made in the case of Said Mohamed Said vs. Muhusin Amiri & Another, Civil Appeal No. 110 of 2020. In respect to the second ground of appeal, Mr. Mbogoro argued that, the first appellate court misdirected itself when it expunged the evidence given by the respondent and still used the same evidence in making its decision. He added that, in its decision the first appellate court referred to the testimony given by the respondent after expunging it which was not a correct approach. Submitting on the third ground of appeal, Mr. Mbogoro argued that, the District Court in its decision replaced the respondent's testimony with its own evidence. He amplifies that, there is nowhere in the trial court's records in which the respondent denied on the number of sulphur bags he was given or its price but the first appellate court came with the issue of discrepancies on the testimony of the respondent in respect to the number of bags. He averred that, the testimony given by the respondent during trial before the trial court never disputed on the number of bags but he blamed the farmers who were given sulphur bags on credit and failed to make payment timely. Thus, the respondent never denied the claim as it was decided by the first appellate court. He emphasized that, the appellant 4 managed to prove his claim of TZS. 7,550,000.00 and prayed for this court to order for the respondent to be ordered to pay that amount and the costs of the suit. On his turn, Mr. Kaukuya, the respondent's learned counsel conceded to the appellant's stance that, the first appellate court erred in raising a new issue and deciding it without affording the parties with an opportunity to address on it. Despite his concession, Mr. Kaukuya faulted the appellant's learned counsel prayer for this court to make a finding that the appellant proved his claim to the required standard and order for the respondent to pay TZS. 7,550,000.00, since the omission made by the first appellate court has the effect of rendering its judgment to be nullity. He added that, under such circumstance, the only remedy is to remit the case records before the first appellate court to comply with the procedures set by the law by availing the parties with an opportunity to be heard and compose its decision. To buttress his argument, he referred to the decision of the Court of Appeal in Kumbwandumi Ndemfoo Ndossi vs. Mtei Bus Services Limited, Civil Appeal No. 257 of 2018 [2021] TZCA (18th February, 2021, TanzLII). 5 Replying to the second ground of appeal, Mr. Kaukuya argued

that, in its decision the first appellate court never relied on the expunged evidence. He submitted that, the first appellate court relied on the submissions of the parties only, which was basically based on the testimony given by the appellant. On the third ground of appeal, Mr. Kaukuya faulted the appellant's learned counsel assertion that, the first appellate court in its decision replaced the respondent's testimony with its own testimony. He argued that, it is in the trial court's records that the respondent was given 140 bags of sulphur valued at TZS. 5,320,000.00 and the appellant was paid TZS. 3,470,000.00 and the remaining amount is TZS. 1,850,000.00 only as it was decided by the first appellate court. He contended that, the first appellate court was correct in holding that the appellant was to be paid only TZS. 1,850,000.00 only. Lastly, basing on the pinpointed irregularities, Mr. Kaukuya prayed for this court to nullify the decision of the first appellate court and the case records be remitted before the district court to compose judgment after having heard the parties. 6 I have carefully studied the submissions made by the learned counsel for the parties and now it is an ample time for the court to determine this appeal on merits. Given the nature and considering the submissions made by the parties in respect to the first ground of this appeal which are all against the first appellate court's raising an issue suo moto and proceeded to determine it without affording the parties with a right to be heard, they have dubbed it to be procedural irregularity which cannot stand before this appeal. Subsequently, in determining the first ground of appeal, this court is called to determine the issue, whether it was proper for the first appellate court to raise the issue suo moto and determine it without affording the parties with a right to be heard. It is a settled law that when the court raises an issue suo moto it has to invite the parties to address the court first before making its findings. This is to abide to the principles of natural justice specifically "Audi alteram partem" that is, listen to the other side, or let the other side be heard as well. It is a principle that no person should be judged without a fair hearing in which each party is given an opportunity to respond to the evidence against him. That being a settled law, the first appellate court when it 7 found out that there was illegality or irregularity in the proceedings of the trial court and there was a need to raise a new issue, after raising it, the first appellate court was bound to invite the parties to address on it. To the contrary, the first appellate court raised the issue suo moto and determined it without availing the parties with an opportunity to address on the matter. In my view, what the first appellate court did is not a miracle. There is plethora of case law rectifying cases where matters were raised suo moto and determined while excluding the parties thereto. Encountered with an appeal like the one at hand, the Court of Appeal issued clear instructions to subordinate courts on raising issues suo moto and deciding the same without inviting the parties to address the court. The Court was very clear that, it is not correct to raise an issue suo moto and decide exclusively. The court has to invite the parties to address the court on the issue raised. This was so held in the case of Director of Public Prosecutions vs. Al-Halil Omar Kombo (Criminal Appeal No. 66 of 2023) [2024] TZCA 292 (2 May 2024, TanzLII), the Court stated that: "... it was not correct, with respect to the learned Judge, to raise the issue suo moto as he did, and decide on it without inviting the parties to make submissions on it. We agree with the learned counsel that this issue ought to have been raised as a ground of 8 appeal or if raised by the court suo moto as it did, the parties

ought to have been called to address the court before making its finding on it. We also agree that failure to call the parties to address the Court vitiated the proceedings and decision. This calls for the exercise of revision powers followed by the resultant orders of retrial.” By analogy, the excerpt quoted from of the Director of Public Prosecutions (supra) is protecting the constitutional rights of parties before courts and tribunals. The right to be heard is constitutionally enshrined under article 13(6)(a) of the Constitution of the United Republic of Tanzania of 1977. The right to be heard has to be protected by the courts jealously. There is a plethora of cases on the right to be heard, just to mention a few, see *Ndesamburo vs. Attorney General* (1997) TLR 137, *The National Housing Corporation vs. Tanzania Shoes and Others* (1995) TLR 251, *Issa Juma @ Magono & Others vs. Republic* (Criminal Appeal No.378 of 2020) [2023] TZCA 17650 (25 September 2023), *NCBA Bank Tanzania Limited vs. VEST Tanzania Limited & Another* (Civil Appeal No. 321 of 2020) [2023] TZCA 17923 (11 December 7 2023), *Yazidi Khassim Mbakileki vs. CRDB 1996 Ltd & Another* (Civil Reference No. 14 of 2018) [2019] TZCA 117 (16 May 2019). 9 Undoubtedly, the first appellate court did what has been repeatedly insisted by the Court of Appeal that, it is not correct for a court or tribunal to raise an issue suo moto and decide the same without availing the parties a right to be heard. In this instant appeal, the issue raised by the first appellate court was not among the grounds of appeal. The first appellate court proceeded to determine the issue without availing the parties the right to be heard. As observed in the authority cited hereinabove, this violated the principle of right to be heard, *Audi alteram partem*. The first appellate court rightly raised a pertinent issue but with due respect, undesirably dealt with it in contravention of the principles of natural justice. Thus, it is established law that, any judicial order made flagrant violation of any cardinal rules of natural justice is void ab initio and its decision must be quashed even if the same decision would have been arrived at if fully observed or even if made in good faith. This position is anchored in the case of *Abbas Sherally and Another vs. Abdul S. H. M. Fazalboy*, Civil Application No. 133 of 2002 and *Dishon John Mtaita vs. The Director of Public Prosecutions*, Criminal Appeal No. 132 of 2004 (both unreported), where the Court held that: 10 “The right to be heard when one's rights are being determined by any authority, leave alone a court of justice, is both elementary and fundamental. Its flagrant violation will of necessity lead to the nullification of the decision arrived at in breach of it.” In view of the cited cases, it is crystal clear that the parties deserved the right to be heard. Since the principles of natural justice were not observed, I am constrained to allow the first ground of appeal and rule that the decision of the first appellate court dated 07th June, 2024 and its consequential orders were bad in law and therefore a nullity and it is quashed and its orders are set aside. Having ruled so, I find the first ground of appeal has merit. In the circumstance, having held that the decision of the first appellate court was nullity and quashed it together with its orders being set aside, I find there is no cogent reasons to determine the remaining grounds of appeal as they were the resultant of the nullified decision. By so doing will serve no purpose, rather than prolonging the judgment unnecessarily. Consequently, I am required, as I certainly do exercise court's revision powers and remit the records of the first appellate court in Civil Appeal No. 21 of 2023 to proceed with the determination of the appeal by 11 availing the parties the right to

be heard. Given the nature of this matter, I make no order as to costs. It is so ordered.

DATED and DELIVERED at SONGEA this 4th day of February, 2025. E. L. KAWISHE JUDGE

COURT: Judgment delivered in the presence of Mr. Edson Mbogoro learned advocate for the appellant and in the absence of the respondent and his counsel. Right of appeal explained.

E. L. KAWISHE JUDGE 04/02/2025 12

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://media.tanzlil.org/media/judgment/325245/source_file/40fc9bd3a4171fcb/JUDGMENT_Kazembe_Said_Kazembe.pdf

CASE PAGE <https://chat.esheria.ai/case-law/tanzania/kazembe-said-kazembe-v-deogratus-mapunda-naturaljustice-tanzlil-2024--6a3ea5243b1caa9129819fe7>

Prepared on 13 October 2026 · Esheria