

TANZANIA / JUDGMENT

martha onesmo vs matondo

magile 2023 tzhc 19523 28 july 2023

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TZHCDECIDED
28 July 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (IN THE SUB REGISTRY OF KIGOMA) AT KIGOMA PC. CIVIL APPEAL NO. 05 OF 2022 (Arising from Civil Appeal No. 42 of 2021 in the District Court of Kigoma, original Civil Case No. 38 of 2021 Uvinza Primary Court) MARTHA ONESMO..... APPELLANT VERSUS MATONDO MAGILE RES PONDENT
Date of last Order: 27/06/2023 Date of Judgement: 28/07/2023

JUDGEMENT

MAGOIGA, J. The appellant, MARTHA ONESMO aggrieved by the decision of the District Court of Kigoma in exercise of its appellate jurisdiction dated 21/04/2022 in Civil Appeal Case No.42 of 2021 now appeals against the said whole judgment and decree to this Honourable Court. In Civil Case No. 38/2021 at Uvinza Primary Court, the respondent sued the appellant Martha Onesmo for breach of contract of driving a motor cycle famously knowns as "Bodaboda" from 18/12/2020 up to 17/10/2021 for 10 months. The respondent sought to recover the money he paid to the appellant to the tune of Tshs.2,800,000/=; which money was paid in the fulfilment of his contractual obligations to the appellant. The trial court decided in favour of the respondent herein. i Bemused by the said decision, the appellant herein appealed to the District court which upheld the trial court's decision and adjudged in favour of the respondent. Still daunted, the appellant has preferred this appeal armed with three grounds of appeal faulting the appellate District Court in the following language namely;

1. That, the first appellate court erred in law and facts for deciding that the respondent was supposed to finish the remaining amount i.e Tshs 70,000/= for four weeks equals to Tshs.265,000/=and the appellant to handle the sold motor cycle to the respondent or to pay the respondent the new one as per the market price notwithstanding that the contract was for one year and was breached after ten months with two months left, and the respondent was the one who breached the contract for failure to furnish the weekly payment as they had agreed.

2. That, the first appellate court erred in law and facts for failure to declare that the respondent is the one who breached the contract and he is supposed to bear the consequences of his breach despite both trial and the first appellate court admit that the respondent was owed Tshs.265,000/= before the appellant to rescind the contract.
3. That, both trial and first appellate court erred in law and facts for failure to analyse evidence adduced by both parties and their 2 witnesses and leading to unjust decision despite the evidence clearly shows that the respondent was the one who breached the contract. On the above grounds, the appellant urged this court to allow the appeal with costs by quashing and set aside the decision of the first appellate court with costs and a declaration that the respondent was the one who breached the contract. When this appeal was called on for hearing, the appellant was represented by Mr. Elisad Samwel Msuya, leaned advocate; whereas the respondent enjoyed the legal services of Ms. Diana Dawson, leaned advocate. On the first ground of appeal, Mr. Msuya submitted that the order of buying a new motor cycle or returning the first motor cycle by the 1st appellate court was wrong and impossible because it did not take into account the circumstance of this case given the elapse of time. On the second ground, Mr. Msuya submitted that the 1st appellate court failed to observe that the respondent was the one who breached the contract for failure to remit Tshs.265,000/= before the appellant rescinded the contract. Arguing on the third ground, Mr. Msuya submitted that the first appellate court failed to evaluate evidence on record and arrived at unjust decision despite the respondent owing Tshs.265,000/= to the appellant. 3 On that note Mr. Msuya prayed that, the appeal be allowed as p'ayed in the petition of appeal with costs. On the other hand, Ms. Dawson for the respondent opposed the appeal by submitting that, the first appellate court was right in its decision because there was ample evidence that the appellant is the one who breached the contract. The learned advocate referred the court to page 10-11 of the trial proceedings stating that while the appellant was testifying never testified on what should have done if payment was delayed. She faulted the appellant for selling the motor cycle despite receiving a good amount of money from the respondent. The said motor cycle was the only consideration on the part of the respondent as against the amount received for ten months. It was her prayer, theretofore, that this ground be dismissed. On the second ground of appeal Ms. Dawson argued that it was misconceived because the respondent was to pay Tshs.265,000/= and not the whole claim. On the 3rd ground the counsel for the respondent argued that the said ground also was misconceived because it was not raised and argued before the lower courts but just emerged at this stage. She urged this court not to consider an issue not decided by the 1st appellate court. In the alternative and without prejudice to what has been submitted above, 4 if the court decide to consider this ground should found that the evidence before trial court was adequately considered. Ms. Dawson urged this court to dismiss the appeal with costs for want of merits. In rejoinder, Mr. Msuya argued that there was no dispute over the existence of the contract between parties and that no disputes that each week was to be paid Tshs.70,000/=. The learned advocate insisted that, the respondent is the one who breached the contract for failure to perform her obligations since parties knew the terms of the contract rather than

the witnesses. He conceded that the third ground of appeal was not at issue before the 1st appellate court and leave to the court to decide. Having carefully gone through the grounds and reply of appeal and also the rivaling submissions for and against this appeal, and after going through the evidence on record in the trial and first appellate proceedings, I find the central issue for determination in this appeal is whether the appeal has merit or not. BLACK'S LAW DICTIONARY 8th Edition by Bryan A Garner Page 563. define breach of contract mean violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. Coming now to the merits of this appeal, in particular, on the first ground of appeal, having carefully followed the rivaling arguments of the counsel 5 for the appellant and that of the respondent, and considered all argued and the record of appeal, in my considered opinion, I found the argument by Mr. Msuya that the order of the 1st appellate court to buy a new motor cycle or hand over the old one to the respondent was wrong and impossible, is without merits because of the following reasons; One, it was agreed and not disputed that at the end of the contract, the respondent could as a consideration, take the motor cycle as his personal property. Two, there is no dispute that the motor cycle which was the subject matter of the contract was taken and sold by the appellant prior to the contractual term come to an end. Three, the appellant had already received more money than the purchase price and the agreed amount of the contract. Besides, it should be noted that, the appellant and the respondent entered into a one-year contract that the appellant gave the motor cycle to the respondent for making a business of carrying passengers commonly known as 'bodaboda' and that the respondent would in performing his obligations be required to remit to the appellant Tshs.70,000/=weekly for 12 months and that upon completion of payment of the agreed amount, the appellant was required to hand over the said motor vehicle to the respondent as his consideration. To my considered view, the appellant breached the contract by taking the motor cycle from the respondent and 6 sold it without involving the respondent. The rights of the appellant could have been exercised by suing for the recovery of the monies which was due against the respondent. That means that, the appellant's rights would to take action against the respondent for failure to remit the agreed Tshs.70,000/= weekly leading to breach of contract but what she did was clear breach of the contract. On the second ground of appeal, the counsel for the appellant faulted the 1st appellate court for failure to observe that the respondent was the one who breached the contract for failure to remit Tshs.265,000/= before the appellant rescinded the contract. On the other hand, Ms. Dawson argued that this ground was misconceived because the respondent was to pay Tshs.265,000/= and not the whole claim. I have traversed the judgement of the 1st appellate court and noted at page 7 of the judgement the first appellate court had this to say, I quote; "...this court is hereby vary the trial court order by ordering the respondent to finish the remained amount i.e Tshs.70,000/ for four weeks equal to Tshs.265,000/=. Upon looking at this holding of the first appellate court I totally agree with argument by the counsel for the respondent that the 2nd ground of appeal is misconceived by the counsel of the appellant. That is to say one ordered to pay Tshs.265,000/= according to the judgement 7 is the respondent and not the appellant. Therefore, this ground fails too for being misconceived.

This takes this court to the third and last ground in which Mr. Msu/a faults the first appellate court for failure to evaluate the evidence of the trial court by putting the appellant on the liability to pay the respondent Tshs.265,000/= while according to him the defaulter was the respondent. This ground cannot detain me much because as I have found in the 1st and 2nd grounds herein above, and much as the counsel for the appellant conceded that it was not among the grounds determined by the 1st appellate court it cannot be raised at this stage because no finding was made by the 1st appellate court to give jurisdiction for this court to consider it. Therefore, this ground cannot be considered now. Without much ado, was wrongly raised, as such I decline to make any finding on it. On the foregoing reasons, I find the entire appeal with no merits and consequently proceed to dismiss this appeal in its entirety with costs. It is so ordered. 8

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