AT TABORA

DC. CIVIL APPEAL NO. 13 OF 2011

(Original Civil Case No. 13 of 2009 from District Court of Bariadi)

AT BARIADI

NASSORO MAGINA NG'HOSHA .....APPELLANT

VERSUS

BRANCH MANAGER NATIONAL MICROFINANCE BANK ..... RESPONDENT

JUDGMENT

09/05&24/06/2013

S.M. Rumanyika, J

It genesis is civil case No. 13 of 2009 instituted on 24th March, 2009 by Nassoro Magina Ng'osha (the Appellant) at the District court Bariadi (the lower court) for recovery of shs. 6,053,600/= from the Branch Manager NMB LTD Bariadi (the Respondents), earlier on deposited therein, in the Nyanza Bottling Coy Ltd (NBCL) bank accout No. 3053500006. To the contrary, the respondents alleged that the actual sum deposited by the appellant, was only shs. 653,600/=. No

more no less. The lower court found in favour of the Respondents. Unsatisfied, the appellant is right here on 6(six) grounds. They boil down are construed to mean only 3:-

1. That the trial magistrate erred in law and in fact by his failure to evaluate the evidence properly.

2. That the trial magistrate erred in law and in fact by framing the issue wrongly regarding the shs. 6,053,600/= claimed.

3. That the trial magistrate erred in law and in fact by rejecting the prosecution exhibit.

The appellant appears in person Mr. Kange learned advocate represents the respondents.

It is evident according to the prosecution case, that the businessman appellant was on agent of Nyanza Bottling Company Ltd (NBCL) and had intended this time round, to purchase one thousand (1000) crates of soft drinks "Soda" (a variety of brands I suppose). Then he duly deposited in the NBCL bank account with the respondents, a total sum of shs. 6,053,600/=. That as usual, the material bank teller Fulgence s/o Saburi (DW1) made the entries, and he recorded it as such.

But then, the later u-turned, accepting now to have actually received the lesser sum of shs. 653,600/=. Save, according to evidence of the respondents, for misrepresentations by the appellant.

On the figures entered on the material the bank form filled. On had inflated it by inserting a "Zero" between figures "6" and "5". So that now the grand sum of money being deposited reads shs. 6,053,600/=. Which fawl was not detected by the respondents late in the day. On the hearing, the made oral submissions.

Additional to his memorandum of appeal, the appellant only faulted the learned Trial Magistrate having rejected his exhibits. Namely the material 24/10/2008 receipt for shs.6, 053,600/= and a copy of bank statement. But the trial Magistrate based at the end of the day, his decision on the documentary evidence rejected.

Responding to ground 1, Mr. Kange submitted that the respondents were at liberty to bring any witnesses of his choice. Including the material bank teller (dw1). It was upon the appellant to contradict the evidence adduced.

That the legal issues, inclusive of that one relating to shs. 6,053,600/= were correctly framed.

On grounds 3 and 4, Mr. Kange submitted that at no given point in time had the appellant attempted even to tender as exhibit, any receipts a bank statement or at all. Nor did the point surface howsoever. Irrespective of the bank statements being in bankers' custody always.

On ground 5, Mr. Kange more or less reiterated what had transpired at the trial. In that the appellant fraudulently inserted a

"Zero" between figures "6" and "5". So that the amount deposited by him now reads shs. 6,052,600/= for 1000 crates of soda. But it was actually 100 (a hundred) crates. According to the actual price of shs. 6,536/= @ then prevailing. But pw1, the material bank teller entered shs. 6, 053,600/= in the books mistakenly.

That the appellants close was not groved on the balance of probabilities. Appeal be dismissed with costs. Counsel wound up his submissions.

With no doubts here the issues are two:-

1) How much money the appellant deposited on the material date with the respondents.

2) Whether the appellant was duty bound to produce the material bank statement in order to prove the amount deposited (issue no. 1 above).

The amount of money actually deposited and number of crates of soda intended to be purchased have a necessary nexus. They need be discussed to gether. It is evident that the appellant had capacity, and used to purchasing 700 – 800 crates of soda. Only that this time round was to by 1000 crates. He paid shs. 6,053,600/= out of 6,536,000/=. And that he could pay the balance on collection of the cargo at a latter stage.

however, in my considered opinion, the number of crates intended to be purchased was immaterial in the circumstances. It could be 100, 1001 or 1001. Mention any number. As the intended payee was not called and testify on this very crusial aspect of the matter. Nor did the respondents retrieve such bank statement revealing the appellant's previous transactions with the NBCL.

Now what was the sum of money actually deposited? DW1 does not tell he never count the money before he proceeded to making the entries in the books. Unless this court is told that it was deliberately arranged by the appellant and dw1 so as to achieve a common goal, the truth will always remain that dw1 duly counted, was satisfied, and then he recorded the money to be shs. 6,536,600/=. No more no less. Only that what is now pleaded is not but a mere afterthought.

Bank customer do not issue, and are no custodians of bank statements. The ppellant asking for the same. If at all it was prudent and every reasonable would expect the respondent to produce the same showing what was it that the appellant had actually deposited on the account.

It is common knowledge that customers are obliged, and they count their moneys before leaving bank counters/ or tellers' windows. Therefore, bankers can never be held responsible for whatever shortage discovered by customer beyond such point. I understand

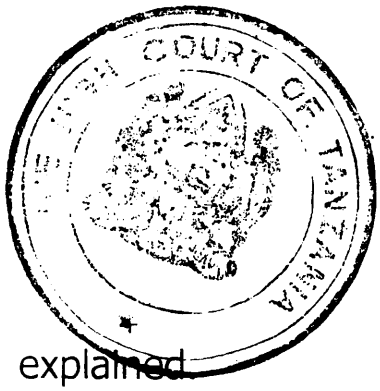
that accounting requirement can not, and was intended to operate one way traffic. It binds upon both sides. A banker and customer the latter is equally bound to a sure himself that the sum purportedly being deposited bear legal tender and tallies with the physical sum presented by customer. Before the latter leaves the counter.

I can imagine. If the above said requirement in accountings was to be observed casually, loss recording by bankers would have been order of the day. And majority of the customers should have shun away probably keeping their moneys at homes in post.

Again, it was the trial magistrate's finding that the appellant failed to disclose on the plaint, member of crates of soda and price per crate. I will only say that the case was against the NBCL the suppliers of soda. Parties do not adduce evidence in pleadings. Nor can it be a requirement. Pleadings in this particular case the plaint merely lay foundation example particulars of the claims and cause of action.

Had the trial learned magistrate observed all these issues, no doubt would have reached at a deferent conclusion.

In the whole decision of the trial court quashed. Appeal is entirely allowed with costs. Here and at the court below.



S.M. RUMANYIKA

JUDGE

18/05/2013

R/A- explained.

Delivered under my hand and seal of the court in Chambers this ..... in the presence of .....