

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

(PC) CIVIL APPEAL NO. 22 OF 2017

*(From District Court of Karatu at Karatu Civil Appeal. No. 22 of 2016, Originating
from Karatu Primary Court Civil Case no. 20 of 2016)*

LEONCE BURA APPELLANT

Versus

KUSHANA SASUMARESPONDENT

JUDGMENT

Date of Last Order: 02/07/2018.

Date of Judgment: 23/11/2018

BEFORE: S.C. MOSHI, J.

This is a second appeal. Originally at Karatu Primary Court here in referred as the trial Court, the respondent successfully sued the appellant for a claim of TZS. 1,704,000/=. The amount was deposited in respondent's Account no. 40901601720 on 30/11/2012 as indemnity on behalf of the

respondent who borrowed a loan from NMB bank on the basis of oral agreement between the two parties to do so. The appellant was aggrieved, however he unsuccessfully appealed to the District Court here in referred to as the first appellate Court. Hence this appeal containing three grounds.

On the first two grounds, the appellant's complaints are that the first appellate court erred in law and in facts when it **first**, dismissed the appellant appeal without any sufficient reasons. **Second**, for failure to consider his appeal which had sufficient reasons against the primary court judgment. The **third** ground, it is couched like a prayer as the appellant is requesting this court for revision Order because of what he calls many wrongs in the Civil Case No. 20 of 2016 by the trial court.

The factual back ground leading to this appeal is rested on the respondent's allegation that; the respondent a business man and the appellant were neighbors. Sometimes, the appellant approached the respondent for a loan of TZS. 1,704,000/= for the purpose of repaying the loan he owed the NMB bank. Upon such oral agreement, the respondent deposited into appellant's account no. 40901601720 on 30/11/2012 and the appellant had to repay the loan in two months' time. However, the appellant did not do so and therefore the respondent filed a criminal case where the

appellant was found guilty at the Primary and the first appellate court, the criminal case ended in the High court where it was decided that the claim was of civil nature hence the respondent instituted a civil case that led to this appeal. The appellant however, denied to befriend the respondent. It was his testimony that he never knew or received any fund through his bank account and to clinch it all, he denied that there was no any witness who testified to prove that there was oral agreement between them.

This appeal was heard by way of written submissions which were dully filed in court. Both parties appeared in person. The appellant, generally wrote down; that the first appellate court had no legal justification to dismiss the appellant's appeal because it gave a total disregard to the points which were raised by the appellant with strong legal basis that could not be overlooked in anyway by the court which administer justice. In stating the same, he went on submitting that the trial court decided on its own opinion leaving out the evidence adduced before it. His basis of this submission was that there is no way in the eyes of the law of contract Act, that the evidence by PW1 and PW2 that TZS. 1,704,000/= was deposited in the appellant's account could prove the ingredients of a valid contract. To him such evidence was a mere statement that the money was deposited into his account which

could not be construed to mean that a loan agreement existed and therefore caution should be taken that such assertion that there was a loan is a product of fabrication as there was no witness who testified to witness the making of such oral agreement for corroboration purposes. To him the two courts below turned a blind eye to this such crucial concern.

In addition to that, it was his view that in legal perception, the fact that the money was deposited into the appellant's account could have been for any other purposes such as business and not necessarily a loan to be repaid and vice versa.

In reply, the respondent attacked the appellant and branded him as a liar and a hypocrite with a strange character that a reasonable man could be ashamed of.

The issue for determination here is whether this appeal has merit or not. To him, the appellant gave two versions of assertion one denial to know the respondent and the money for he did not seek the money nor was he a business man, this was at the trial court while at the first appellate court he admitted that he was sick and that is why he sought the appellant to deposit

the money. To the respondent that was nothing but an intention to deceive hence perjury. Reference was made to section 102 of the **Penal Code**.

On the other side, the respondent was of the view that the appellant is only trying to renounce oral agreement but admitting that money was deposited to his account but for some other purpose namely business did not take into account the evidence of the Banker. It was his submission that this appeal lacks merit hence it has to be dismissed with costs.

In rejoinder, the appellant reiterated what he submitted in the main submission and insisted that the respondent failed miserably to prove that he was the one who deposited the money in his account. His basis of this stance is that as per evidence of DW1 the money was deposited by the former Bank manager namely Mtalo.

As hinted earlier this is the second appeal, thus I am constrained with settled principle by the Court of Appeal of Tanzania in the case of **SAMOLA THEOBARD VERSUS REPUBLIC, CRIMINAL APPEAL NO. 234 OF 2014, Court of Appeal sitting at Bukoba (Unreported)** at page 8 where it was stated;

*"We take it to be established law of respectable antiquity that, on a second appeal, this court will not readily interfere with concurrent findings of facts by the two courts below. **It can only do so when satisfied that they misapprehend the evidence in a such manner as to make it clear that the conclusions of facts arrived at were based on incorrect premises or there has been a miscarriage of justice etc.**"*

Others are such as **D.R PANDYA VERSUS REPUBLIC [1957] EA 336; DANIEL NGURU AND 4 OTHERS VERSUS REPUBLIC, CRIMINAL APPEAL NO. 178 OF 2004** and **FELIX KICHELE AND EMMANUEL TIENY @ MARWA VERSUS REPUBLIC, CRIMINAL APPEAL NO. 159 OF 2005 Court of Appeal of Tanzania at Mwanza (Unreported).**

The 1st and 2nd points of appeal centers on the issue of analysis of evidence; hence I will discuss them together. Therefore, the question here is whether there is a need for this court to interfere with the concurrent findings of the lower courts. I would also like to point out here that I have seen nothing substantial relating to the 3rd ground of appeal that may make this court exercise its revisionary powers.

In the instant appeal, it is common ground that the respondent deposited TZS. 1,704,000/= in the appellant's account no. 4090161720 on

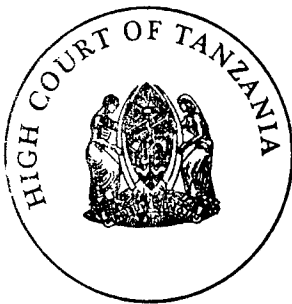
30/11/2012, the account which by now is dormant since 2016. All along what is disputed is the purpose of depositing the said amount. The respondent at the trial was of the view that he deposited the said amount after the appellant approached him and asked orally for such amount as loan so as to clear a Bank loan and they were only the two of them. The terms were that the appellant would repay the loan within two (2) months period which he did not do. To verify the same, the respondent called a bank officer one Elizabeth Chiwinga, PW2 who said that such amount was deposited and the pay slip was signed by the manager one Mtaló and the said amount was consumed in the loan with the bank. On the other hand, the appellant differs greatly and contented that the deposit could not necessarily be for loan as it could be for business transactions and therefore to him in the eyes of law ingredients of contract are lacking as no one witnessed them contracting.

The law is settled that a contract can be made either orally or in writing. As said earlier, the appeal centers in analysis of evidence. The trial court was satisfied that the said amount was deposited to the bank account which were used to repay loan and therefore it was a valid loan agreement as proved to the balance of probabilities. I am at one with the findings of the trial court for the simple reason that in civil matters the burden of proof

is on the balance of probabilities, which to my scrutiny the evidence of the respondent is heavier than that of the appellant. The appellant's grounds of appeal are without merit; therefore, the appeal is dismissed forthwith. That said, there is no need to interfere with the findings of the lower courts below. The appellant has to pay costs of this appeal.

It is so ordered

Right of Appeal is explained.




S.C. MOSHI
JUDGE
28/09/2018