IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

(PC) CIVIL APPEAL NO. 69 OF 2017

(Arising from Civil Appeal No. 66 of 2016 before Resident Magistrate Court of Morogoro at Morogoro originating from Civil Case No. 26/2016 at Mvuha Primary Court)

Salum Malo .....Appellant

Versus

Saidi Salehe Mikuso .....Respondent

JUDGEMENT

Date of Last order: 31.03.2020

Date of Ruling: 30.06.2020

Ebrahim, J.:

This case originates from the Primary Court of Mvuha at Morogoro whereby the respondent herein successful sued the appellant herein. The respondent's claim at the Primary Court was that the appellant had approached the respondent on 10.11.2015 to borrow Tshs.600,000/-. Therefore they agreed that the respondent shall give the appellant the asked amount i.e. Tshs. 600,000/- and the appellant shall give the respondent a piece of land of 10 acres for cultivation of rice of which the respondent gave the appellant an additional of Tshs 600,000/- for cultivation. The respondent also gave the appellant Tshs

500,000/- for sowing (Tshs.50,000/- per acre – 10-acres) and Tshs.400,000/- for the seeds totaling Tshs. 2,100,000/-. The respondent claimed that when he gave money to the appellant it was witnessed by two people. He claimed also that it was the appellant's responsibility to hand over the produce to the respondent when the respondent returns from Dar Es Salaam. However the respondent came to find the appellant in August 2015. When the case was called for hearing, the respondent called 4 witnesses.

On his part the appellant claimed that on that particular day he travelled to Dar Es Salaam and it was his wife who leased the shamba to the wife of the respondent.

Upon hearing the evidence from both parties, the trial magistrate decided in favor of the respondent and ordered the appellant to pay Tshs. 2,100,000/-.

Aggrieved the appellant appealed at the Resident Magistrate's Court of Morogoro at Morogoro.

The first appellate court re-evaluated the evidence on record and found out that there was an oral contract between the appellant and the respondent. The appellate court found further that the act of the appellant of not calling his wife as a witness to prove his assertion has

an adverse effect so is his failure to call members of his family. The appellate court accordingly dismissed the appeal and upheld the decision of the Primary Court.

Aggrieved again, the appellant has come to this court raising three grounds of appeal which are predicated on the complaints that the appellate magistrate erred in deciding that there was a contract and consideration between the parties; and that the respondent's evidence was weak.

This appeal was argued by way of written submission.

The appellant was represented by advocate Maryam Kapama whilst the respondent had the services of advocate Benedict Pius.

In amplifying the grounds of appeal, Counsel for the appellant mainly submitted on the duty of the appellate court on the issue of interference with the trial court findings (**Materu Leison & J. Foya Vs. R.Sospeter** (1988) TLR 102); and the duty of the appellate court to weigh evidence (**Ndizu Ngasa V Masisa Magasha** (1999) TLR 202). She also submitted at length on the ingredients of contract on consideration and the contradiction on the evidence of SM2 on the number of people found at the vicinity (**Makame Junedi Mwinyi Vs Serikali ya Mapinduzi Zanzibar** (SMZ) [2000] TLR 455). Counsel for the

appellant further referred to the case of **Hemedi Saidi V Mohamed Mbilu** (1984) TLR, on the failure to call an important witness and the weighing the quality of evidence. She prayed for the appeal to be allowed.

On the other hand Counsel for the respondent contended that there is no dispute that there was an oral agreement between the parties as testified by SM1, SM2 and SM3. In cementing the argument of the existence of an oral contract, Counsel for the respondent referred to the case of **Buku V Magori** [1971] HCD 161 on the principle that a party can prove the existence of an oral contract by commencing performance and taking possession of the goods. He put further reliance on the provisions of **section 110(1) of the Law of Evidence Act, Cap 6 RE 2002** that *whoever desires court to give judgement on his favor on the existence of facts must prove that those facts exist.* He concluded on the point that the appellant did not call his wife to prove that it was her who leased the shamba. He argued therefore that the respondent's case was heavier than the appellant's (**Hemedi Saidi V Mohamed Mbilu – supra).** He concluded that the appeal be dismissed for want of merits.

As it can be observed this is a second appeal. The general rule is that an appellate court should not disturb the concurrent findings of facts of the lower courts unless there has been a misapprehension of evidence, a miscarriage of justice or violation of some principles of law or practice. The said principle has been enunciated in the cases of **Issa Mgara@ Shuka V Republic**, Criminal Appeal No.37 of 2005 (Unreported); and **Dickson Joseph Luyana and Another V Republic**, Criminal Appeal No.1 of 2005 (Unreported), to name but a few.

I shall address the grounds of appeal generally.

I have dispassionately gone through the rival submissions by counsels from both parties as well as going through the evidence on record. It can be noted that the main issue is whether the respondent managed during the trial to prove on the balance of probability that he availed Tshs. 2,100,000/- to the appellant.

In order to determine the above issue, it is needed to go back to the evidence as per the claim by the appellant that the same was not properly appraised.

SM1, **the respondent herein** told the trial court that the respondent went to his house on 10.11.2015 wanting to borrow Tshs. 600,000/-. They agreed on leasing the shamba for rice cultivation to the

respondent. The appellant was supposed to take care of such arrangement and by the time the respondent returns on March 2016, he should find the rice plantations on the peak. The respondent came back in March 2016 but did could not find the appellant and there was nothing. **SM2 Ramadhani K. Pemba** testified before the court that he was passing by the area when he was called by the respondent who wanted him to witness the transaction of Tshs.2, 100, 000/- with the appellant where the appellant would cultivate the shamba for the respondent. SM2 said they were a total of 4 people including himself, another witness, appellant and the respondent. **SM3 Hassani Idd Ramadhani** testified that on 10th November 2015 around 1100hrs he went to the milling machine at the respondent's place. He found the respondent, the appellant and SM2. He said he evidenced the respondent giving Tshs. 2,100,000/- to the appellant for cultivation. **SM4 Shomari Lufuki – the VEO** testified on how the appellant went to him wanting to initiate a talk with the respondent. He met with them in the office and one Magona Mzee Nenga said that the said shamba was not the appellant's.

SU1, the appellant herein told the court that it was his wife (appellant's wife) who told the respondent's wife that she has six acres for leasing.

She leased for Tshs. 50,000/- per acre. The appellant firstly collected Tshs. 100,000/- and then Tshs 300,000/- from the respondent's wife. He testified also that he assisted the respondent's wife to get a tractor through one Yuba and told Yuba that he shall be paid by the respondent's wife. He said he went to Dar Es Salaam on 09.11.2015 and that on the disputed date he was not around. He tendered bus tickets as **exhibits "M1".** When asked as to whether his wife is around, he admitted that she was around. According to **SU2 Rashidi Ndandonda's** testimony he called the appellant on either 7th November 2015 or 8th November 2015 wanting him to go to Dar Es Salaam. The appellant left on either 8th November or 9th November to Dar Es Salaam and he returned on 22nd November 2015.

I begin with the argument by the Counsel for the appellant that there is contradicting statements between SM2 and SM3 on whether it was SM2 who found SM3 or vice versa. It's true that SM3 said he found SM2 at the area while SM2 said he found three people. Nevertheless, I do not find that contradiction alarming because many a times people forget especially after passage of time or events. The issue here is whether both SM2 and SM3 evidenced the act of the appellant being given money by the respondent. They both testified to have witnessed

the transaction and that the amount of Tshs. 2,100,000/- given to the appellant was for cultivation to be done and supervised by the appellant when the respondent would be away until March 2016. The fact that there was some sort of agreement on cultivation of the shamba between the appellant and the respondent was confirmed by **SM4 – the VEO** who testified that the appellant went to him to initiate the talk with the respondent. During the talk it was revealed that the shamba was not appellant's but someone else's. It follows therefore that there is enough evidence that the appellant and the respondent entered into an agreement to lease the shamba; hence corroborating the testimonies of SM1, SM2 and SM3 that the appellant received Tshs. 2,100, 000/- from the respondent.

The respondent denied his involvement on the agreement and told the court that the agreement was entered between his wife and the respondent's wife. When asked about the whereabouts of his wife, he admitted that she was around. It is my findings here that the evidence of the appellant's wife would have been crucial to confirm that indeed it was not the appellant who was given money by the respondent. At this juncture, the burden of proof shifted to the appellant after alleging the involvement of his wife – see **section 110(1)**

of the Law of Evidence Act, Cap 6 RE 2002 on a person who has a duty to prove the existence of the alleged fact. Furthermore, *the court may draw adverse inference in certain circumstances against a party for failure to call an important witness who would support his case without any sufficient reason that if called he/she would have given evidence contrary to the interest of the party.*

I subscribe to the holding of **Hemedi Saidi V Mohamed Mbilu (supra)** to substantiate my stance. This shows that the appellant failed to discharge his legal burden by failure to substantiate his assertion that the arrangement was entered by his wife and not himself.

SU2 testimony was of no value because he could not be certain as to when exactly he called the appellant between 7th or 8th November 2015 and could not also be certain as to whether the Appellant travelled on 8th or 9th November 2015. Besides a trip from Appellant's village to Dar is just a day trip. It is therefore not conclusive evidence that the appellant was not in his village on 10.11.2015. While SU2 could not be certain as to when SU1 arrived in Dar, he was certain that he asked him to buy goods on 10th November 2015 and he did not evidence what time did they meet. All in all following there is a strong

evidence from people who saw the appellant on 10.11.2015 receiving money from the respondent. More – so due to the appellants failure to call his wife to confirm the transaction without any reason; I am inclined to agree with the Counsel for the respondent that the evidence adduced by the respondent at the trial court was heavier and carried more weight than that of the appellant.

From the above background, I find no reason to interfere with the findings of the two lower courts. I find this appeal to be unmeritorious and dismiss it with costs.

Accordingly ordered.

THE HIGH COURT OF TANZANIA

R.A. Ebrahim
Judge

Dar Es Salaam
30.06.2020