IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

(PC) CIVIL APPEAL NO. 19 OF 2019

(Appeal from the Judgment of the District Court of Ukerewe at Nansio (Selemani, RM Dated 18th of February, 2019 in Civil Appeal No. 15 of 2018)

LUKONDO LUSEKE ..... APPELLANT

VERSUS

SHUKRANI LUSATO ..... RESPONDENT

JUDGMENT

16th April, & 11th June, 2020

ISMAIL, J.

This is a second appeal that arises from the judgment of the District Court of Ukerewe at Nansio, pronounced on 18th February, 2019. The decision upheld the judgment of the Primary Court of Ukerewe at Bukindo, in respect of PC. Civil Case No. 36 of 2018, in which Shukrani Lusato, the respondent in the instant appeal, emerged a victor. In consequence of all that, the trial court ordered the appellant to pay the plaintiff a sum TZS. 151,000/- being the sum which was advanced to him as labour charge for roofing the respondent's house. This decision was

upheld by the first appellate court, following dismissal of the appeal which was preferred by the appellant. Undaunted, the appellant has escalated this matter to this Court.

Facts constituting the instant appeal are not complex. They roll back to 3rd June, 2018, when the appellant was engaged by the respondent to roof the latter's house for a consideration of TZS. 260,000/-. Out of this, the respondent allegedly paid a sum of TZS. 100,000/- on the first day. Midway through the assignment, the appellant was allegedly advanced a further sum of TZS. 51,000/-. Both of these payments were made in the presence of the respondent's spouse. It was alleged that after the second tranche, the appellant disappeared, never to return to the site, despite persistent calls by the respondent. The respondent alleged that, as a result of the appellant's failure, 15 pieces of timber rails which were laid on the roof were stolen. The cost of the timber was allegedly TZS. 60,000/-.

Feeling conned, the respondent instituted the proceedings in the Primary Court of Ukerewe at Bukindo, the trial court, claiming a refund of the sum allegedly advanced to the appellant. The appellant admitted that he was engaged by the respondent to roof his house for a consideration of TZS. 365,000/- and that a sum of TZS. 151,000/- was paid as an initial

payment, while the balance would be paid on completion of the work. The appellant's contention was that, while work was completed as agreed, the respondent has not honoured his part of the bargain, meaning that he owes the appellant the balance of the contract price. The trial Court partly allowed the respondent's claim to the tune of TZS. 151,000/-, while rejecting the remainder of the claim on the ground that the same had not been proved. The appellant felt aggrieved. He escalated the matter to the District Court which found nothing faulty in the trial court's decision. It upheld the decision of the trial court as it dismissed the appeal. This decision sparked the appellant's fury. He has moved this Court through a three-ground petition of appeal, reproduced as follows:

1. *That, the trial magistrate erred in law and facts by admitting the hearsay evidence adduced by the respondent's witness and entering the judgment based on the hearsay evidence testified by the respondent's witness.*
2. *That, the trial magistrate erred in law and facts for failure to consider and assess the appellant's evidence.*
3. *That, the trial magistrate erred in law and facts in delivering his judgment by basing on inconsistencies and controversial testimonies averred by the respondent's witness.*

When the matter was called for orders, the Court acceded to the parties' prayer to have the matter disposed of by way of written

submissions, a schedule of which was commendably complied with by the parties.

Kicking off the conversation was the appellant. Arguing his grounds of appeal in seriatim, he made a preambular statement by contending that the agreement entered between the parties is void *ab initio*. With respect to ground 1, his contention is that the evidence which was relied upon to entertain the respondent's claims was hearsay, therefore in contravention of section 62 (1) (b) of the Evidence Act, Cap. 6 R.E. 2002 (now R.E. 2002). In this respect, the appellant held the view that the testimony of PW2 was hearsay as she was not present when the parties entered into the agreement, and the trial court's record showed that nobody witnessed the agreement. The appellant further castigated the trial court for accepting the respondent's version of the story while no documentary evidence was adduced in that respect. He maintained that the consideration for the work contracted for was TZS. 360,000/- out of which the respondent allegedly owes him TZS. 209,000/- which he prays that the Court should order its payment. The appellant wondered why the respondent hadn't reported the theft incident of the timber rails to the police.

With respect to ground two, the contention by the appellant is that his testimony was not considered. He held the view, as well, that, since the

agreement showed the start date with finish last date, and terms of the agreement were not known and lacked the component of consideration, then the same was void *ab initio*. He argued that while the respondent's testimony was fell short of the threshold required in civil cases, the trial magistrate erred when he disregarded the strong evidence adduced by the appellant. In this respect the appellant cited the provisions of section 2 (1) (g) and (j) of the Law of Contract Act, Cap. 345 R.E. 2002, and the decision in ***Dandity v. Sekatawa*** (1964) ALR Comm. 25, in which an agreement that was not reduced into writing was discounted. He repeated his contention that the respondent should be ordered to pay what is due from him.

With respect to ground three, the appellant imputed contradictions and controversies in the testimony adduced by the respondent. Without clearly demonstrating the areas marred by the alleged contradictions, the appellant cited the Magistrate Court's (Rules of the Evidence in Primary Courts) Regulations and the Evidence Act (supra) and a couple of court decisions to impute that there were inconstancies and controversies in the respondent's testimony, thereby ignoring the fact that the respondent ought to pay the appellant the sum due to him. Consequently, he invited the Court to allow the appeal.

Submitting in rebuttal, the respondent urged the Court to resist the temptation of disturbing the concurrent findings of the lower courts where there is no evidence of misapprehension of evidence, miscarriage of justice or violation of the principle of law or procedure. Defending the decisions of the lower courts, the respondent argued that the said decisions were based on the credibility of the testimony adduced during trial.

On the validity of the agreement, the respondent argued that there is no dispute that the parties were under such arrangement and that agreements are also based on or consistent with certain customs or usages of a particular trade or profession. In this case, he contended, evidence adduced by the respondent proved the existence of such contract. He, therefore, urged the Court to dismiss the appellant's contention.

The respondent's rejoinder reiterated what was contended in the submission in chief and urged the Court to be enjoined by Article 108 (2) of the Constitution which empowers the Court to determine the matter.

I have dispassionately reviewed the contending submissions and the record of proceedings in both of the lower courts. Having done that, I am in a position to state at the outset, and without any fear of contradiction, that this appeal has no merit and deserving nothing but a dismissal. I shall demonstrate.

The first ground of the appellant's complaints is that the trial court relied on hearsay evidence to accede to the respondent's claim. On this, the appellant relies on the provisions of section 62 (1) (b) of the Evidence Act and he has singled out PW2's testimony for criticism. He contends that PW2 knew nothing about the terms of the agreement between the parties.

It is a trite position that, as a general rule, oral evidence, whenever adduced, must always be direct and not a third party account. This is the import of section 62 (1) of the Evidence Act (supra). This implies that, save for exceptions as enumerated in the proviso to section 62 (1), the courts are under obligation to assess the testimony tendered before them, and make an appropriate finding on whether such testimony qualifies as direct evidence or evidence that falls into the realm of acceptable third party accounts. This position has been emphasized time and time again, through a plethora of decisions. In ***Subraminium v. Public Prosecutor*** [1956] W.L.R. 965, the Privy Council defined hearsay evidence is to mean an assertion of a person other than the witness testifying, offered as evidence of the truth of that assertion rather than as evidence of the fact that the assertion was made. Illustrating further on the hearsay rule, the said Court stated as follows:

> *"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay*

and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made."

Having laid the foundation, the question to be resolved with respect to the first ground of appeal is whether the trial court's decision was founded on a hearsay testimony. The trial court proceedings reveal that the decision of the trial court was substantially based on the testimony of PW1, the respondent, who gave a blow by blow account on how and what the parties agreed to, what was paid as a consideration, and how the appellant allegedly reneged on his promise. PW2's testimony was confined to the manner in which the sum which was paid to the appellant changed hands. The testimony by PW2 touched on matters which were not in contention *i.e.* the quantum which was paid to the appellant. At the end of all this, the trial court was convinced that the respondent's case, as gathered from the testimony of PW1 was more credible and believable. In so doing, the trial court was guided by a canon of justice, as accentuated in ***Hemed Said v. Mohamed Mbiiu*** [1984] TLR 113, to the effect that ***"the person whose evidence is heavier than that of the other is***

the one who must win." The respondent's testimony, which was direct, was found to be heavier than that of the respondent and I find nothing blemished when the 1st appellate court gave it a thumbs up and dismiss the appellant's contention. I find nothing untoward in the trial court's wisdom in this respect. I dismissed this ground of appeal.

The appellant's second ground of appeal takes an exception to the trial magistrate's failure to consider the appellant's defence. Going through the record of the trial court, it is discerned that the appellant's defence was that he completed the work for which he was contracted and that, having done that, what remained was the respondent's obligation to make good the balance sum which is to the tune of TZS. 209,000/-. This account of facts is reflected at page 2 of the trial court's judgment and analysis of the said testimony has been covered at page 4 of the impugned judgment. This defence did not resonate to the trial magistrate who chose to attach weight to the testimony of the plaintiff then, now the respondent. As stated earlier on, the trial court found the evidence adduced by the respondent more convincing, credible and cogent. The trial court viewed the appellant's testimony deficient to lean on. It should be clearly understood that, while a trial court has a duty to consider testimony of the parties to the proceedings, that duty does not extend to the point of

concurring with it, if the trial court is of the view that such testimony is below the threshold required in proving the case.

The appellant ought to have known that the proceedings in the trial court were civil in nature which, like all others of that kind, they require the person who desires to have the court find in his favour proves his case. The standard of proof required to convince the court is on the balance of probabilities, consistent with sections 110 through to 113 of the Evidence Act, Cap 6 R.E. 2002, and the Rules of Evidence in Primary Courts (supra). The position in our jurisdiction mirrors what obtains in the Indian Evidence Act, 1872, as lucidly commented by the legendary Sarkar on Sarkar's Laws of Evidence, 18th Edn., ***M.C. Sarkar, S.C. Sarkar and P.C. Sarkar***, published by *Lexis Nexis*. At page 1896, the learned author distilled the following principle:

> ***"... the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof.*** *It is ancient rule founded on consideration of good sense and should not be departed from without strong reason .... Until such burden is discharged the other party is not required to be called upon to prove his case.* ***The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party..."*** [Emphasis added].

This position is in consonance with Lord Denning's incisive reasoning in ***Miller v. Minister of Pensions*** [1937] 2 All. ER 372, which was cited with approval in the recent decision of the Court of Appeal of Tanzania in ***Paulina Samson Ndawavya v. Theresia Thomas Madaha***, CAT-Civil Appeal No. 45 of 2017 (Mwanza-unreported), in which the following passage was quoted:

> *"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches of the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say – We think is it more probable than not, the burden is discharged, but, if the probabilities are equal, it is not ...."*

In view of the foregoing, I hold the view that the trial court was within its right to prefer the respondent's testimony to that of the appellant. I see nothing faulty in this finding and I dismiss this ground of appeal.

The appellant's onslaught on the trial court, as reflected in ground three of the appeal, relates to what he contends as contradictions and controversies in the respondent's testimony. As I stated earlier on, areas shrouded in the alleged contradictions and controversies have not been highlighted. This leaves the Court in a limbo as its decision will depend on information which is scanty. The established principle is that contradictions in the testimony of a party, if proven and are of fundamental proportion, have the effect of discrediting the testimony and render the case lacking in credibility. In ***Luziro s/o Sichone v. Republic***, CAT - Criminal Appeal No. 231 of 2010 (unreported), the Court of Appeal held:

> *"We shall remain alive to the fact that not every discrepancy or inconsistency in witness's evidence is fatal to the case, minor discrepancies on detail or due to lapses of memory on account of passages of time should always be disregarded.* ***It is only fundamental discrepancies going to discredit the witness which count."***

The decision in the just cited case followed in the footsteps of another splendid decision of the Court of Appeal of Tanzania in ***Disckson Elia Nsamba Shapurata & Another v. Republic***, CAT - Criminal Appeal No. 92 of 2007 (unreported), in which the learned Justices quoted the passage in ***Sarkar's Code of Civil Procedure Code***. It was held as follows:

"Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to material disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. ***Material discrepancies are those which are normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a parties' case material discrepancies do."***

In ***Mukami w/o Wankyo v. Republic*** [1990] TLR, the Court of Appeal took the view that contradictions which do not affect the central story, are considered to be immaterial. The foregoing borrowed a leaf from another fabulous position accentuated in ***Sahoba Benjuda v. R,*** CAT-Criminal Appeal No 96 1989 (Unreported), wherein the Court of Appeal held as follows:

"Contradiction in the evidence of a witness affects the credibility of the witness and unless the contradictions can be ignored as being only minor and immaterial ***the court will normally not act on the evidence of such witness touching on the particular point unless it is supported by some other evidence."***

My scrupulous review of the trial court's proceedings lends no serious credence to the appellant's contention. Nothing contradictory or controversial can be said with respect to the respondent's testimony. The testimony of PW1 and PW2 was complimentary of each other, and it

cannot be said that any of this crossed paths with another as to infer a sense of controversy or contradiction, as contended or at all. I find this ground hollow.

In view of the foregoing and, as I intimated earlier on, I find the appeal misconceived and lacking in merit. Accordingly, the same is dismissed with costs.

It is so ordered.

DATED **at MWANZA** this 11th day of June, 2020.

M.K. ISMAIL

JUDGE

Date: 11/06/2020

Coram: Hon. J. M. Karayemaha, DR

Appellant: Present

Respondent: Present

B/C: B. France

Appellant:

The matter is set for judgment. I am ready to receive it.

Respondent:

I am ready for the judgment.

Court:

1. Judgment delivered under my hand and Seal of the Court this 11th June, 2020 in the presence of both parties.
2. Right of Appeal dully explained.

J. M. Karayemaha

DEPUTY REGISTRAR

At Mwanza

11th June, 2020