

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

PC. CIVIL APPEAL NO.35 OF 2019

(From Civil Appeal No. 33 of 2018, Bariadi District Court, Original Nkololo Primary Court, Civil Case No. 7/2018)

VICTOR SABATO.....APPELLANT

VERSUS

PILI TUMA..... RESPONDENT

JUDGMENT

1st September & 16th October, 2020

Mdemu,J.;

In the Primary Court of Nkololo, the Respondent one Pili Tuma filed a claim against the Appellant claiming Tshs. 1,410,000/= being unpaid loan facility. The trial primary court determined the claim and ultimately, ordered the Appellant to pay the Respondent Tshs.1,000,000/= This was on 11th of June 2018.

The Appellant was dissatisfied with the decision of Nkololo Primary Court thus, appealed to the District Court of Bariadi, in civil appeal No. 33 of 2018, in which, on 29th of July, 2019, his appeal was dismissed on merit, thus confirming the decision of the primary court. The Appellant was also not happy with that decision, thus lodged the instant appeal on the following two grounds of appeal:-

- 1. That, the learned Resident Magistrate erred in both law and fact to dismiss my appeal without considering the Respondent has failed to prove her claim specifically as claimed.*

2. *That, this learned Resident Magistrate erred in both law and fact by failing to give sufficient consideration and weight to the contradicting evidence adduced by all, Respondent together with her witnesses.*

When the appeal came for hearing before me on the 1st of September, 2020, the Appellant appeared in person while the Respondent was represented by Mr. Masige. Learned Advocate. The Appellant submitted in the two grounds of appeal as one.

Generally, the Appellant submitted that, in their findings, both courts below did not consider and analyze properly the evidence on record. He thought there was contradiction of the Appellant's evidence on the amount of loan taken. He added that, SM1 Kigema Malatuni testified a different account to what *Inspector* Masalu (SM3) and the Village Chairman testified about the amount of loan taken. He summarized in this point that, all the four prosecution witnesses differs materially on the amount of loan taken.

Regarding the evidence in totality, the Appellant submitted that, taking the totality of evidence on record, the claim of the Respondent was not proved. He was awarded Tshs. 1,000,000/= contrary to the claimed amount which was almost Tsh.1,500,000/= He thus concluded that, the genuine claim is Tshs.480,000/=. He thought the allegations are unfounded and is a result of misunderstanding regarding rent between him as a tenant to the Respondent. He urged me, on that account, to allow the appeal.

In reply, Mr. Masige, learned Advocate for the Respondent submitted that there is nothing on misunderstanding regarding rent and the same never featured at the trial court. Responding to the 1st ground of appeal, the learned

Advocate had an observation that, there is a concurrent finding of two courts below regarding the balance of Tshs. 1,000,000/= which the Appellant did not pay. He also commented on this that, the two decisions based on credibility of witnesses. It is on this fact Mr. Masige stated that, the Respondent evidence was trusted compared to that of the Appellant. He added that, the Appellant conceded to take the loan and that, the balance of Tshs.480,000/= remain unpaid.

Having that in mind, the learned counsel cited the case of **Ibrahim Mohamed v. Halima Guleti (1968) HCD 76** insisting that, the trial court is better placed to make assessment on credibility of witnesses where the decision rests on that principle. In this, he added, as the central issue was on the amount of loan, the evidence of SM2 and SM3 indicates that the Appellant conceded the claim of Tshs. 1,000,000/=: thus, in terms of section 123 of the Evidence Act, Cap. 6, he is estopped to state otherwise.

As to the unpaid balance of Tshs. 480,000/= admitted by the Appellant, Mr. Masige was of the view that, the Appellant is duty bound to prove the same and that, in terms of section 112 of the Evidence Act, no any witness was called by the Appellant in support of the allegation. He cited also the case of **Catherine Merema vs. Wathaigo Chacha, Civil Appeal No.319 of 2017** (unreported) that, in civil litigation, a part who has heavier evidence is taken to have proved the claim.

He concluded that, according to the evidence, the Respondent has proved that the Appellant was to pay Tshs. 1,000,000/= and not Tshs.480,000/=. There is therefore no contradiction or hearsay evidence in the record as alluded by the Appellant. He thus urged me, on those premises, to dismiss the appeal.

The Appellant rejoined briefly that, SM3 did not tender any document to the effect that, the Appellant conceded to the claim. This was also the case to SM1, the Appellant added. He reiterated that, the claim is on failure to pay rent. To the Appellant, as submitted in chief, the claim is that of Tshs. 480,000/= and not otherwise. This was the end of their submissions.

I have considered submissions of the Appellant and that of the learned counsel for the Respondent along with the entire evidence on record. Taking that into account, it is not disputed that, there was an agreement between the Appellant and the Respondent which agreement led to the loan facility benefiting the Respondent. What is at stake is the term loan and unpaid balance. In resolving this, as parties did, I will also resolve the two grounds as one.

As to the term loan, the claim as lodged in the trial Primary Court is reproduced as hereunder:

"Mimi ninamdai mdaiwa Victor Sabato fedha ya Mkopo shs 1,410,000/= kwa sababu mnamo 20/2/2016 anirudishie 30/3/2016 mpaka ameshindwa kunilipa. Naomba Mahakama inisaidie kupata haki yangu. Sina mengi Zaidi."

In evidence in support of the claim, SM1 Kugema Malatuma said the total claim was Tshs. 1,580,000/=. This was also the evidence of SM2 Pili Tuma and SM4 Mwalu Simmosi. On his part, SM3 stated that, the term loan was Tshs.1,410,000/=. However, according to evidence on record, the amount of Tshs. 1,410,000/= is a result of part payment of the total term loan. Here is where the contradiction is in the evidence on record as follows:

One, SM1, (the Chairman) stated at the trial court that, the Appellant paid Tshs.300,000/ thus remaining the balance of Tsh.1,280,000. However, the Appellant had another loan from another person and there was a time when he was arrested, then the Respondent paid for him Tshs. 130,000/= thus adding to the balance of Tshs. 1,280,000/=sums to unpaid balance of Tshs.1, 410,000/=, that subject of the instant claim.

Two, the Respondent who testified as SM2, like the testimony of SM1, the Appellant paid the 1st installment of Tshs.300,000/= She however said the Appellant took another loan of Tshs. 130,000/= thus leading to the total claim of Tshs. 1,410,00/= The variance in evidence with SM1 is on how the Tshs. 130,000/= landed in the hands of the Appellant.

Three, the version of SM3, a police officer, much as he registered the claim of Tshs.1,410,000/=, that claim originated from unpaid rent of Tsh.120,000/= another loan of Tshs.290,000/=, Later the Appellant requested another loan of Tshs.600,000/=, and then Tshs.400,000/=. This in simple arithmetic equals to the total sum of Tshs.1,410,000/=. However, according to SM3, the Appellant admitted the total loan to be Tshs.1,200,000/=

Four, on his part, SM4 testified that the Appellant never paid the whole loan term of Tshs.1,580,000/= What I have so far noted in the Respondent's case at the trial court is contradictory regarding the term loan, how it was secured, accrual and the amount paid so far. Having this, it is of essence first to state the legal position so as to resolve this nature of evidence. In the provisions of Regulation 1(2) of the Magistrates' Courts (Rules of Evidence in Primary Court) Regulations, GN. No. 55 of 1964, it is provided that:

"Iwapo mtu anafanya dai juu ya mwingine katika kesi ya madai, mdai huyo lazima athibitishe matukio yote yanayolazimika ili kusimamisha dai hilo ila kama huyo mdaiwa mwingine(ndiyo kusema mdaiwa) anakiri dai hilo."

In the instant case, the Appellant, much as he admits to have taken the loan, the amount, mode, and the manner of payment of the loan differs to what the Respondent and his witnesses testified. It is to say, the Appellant disputed the claim. On that note, given the contradiction in evidence of the Respondent and the authority as cited above, it is clear that, the claim was not proved especially under circumstances that, the loan agreement was not reduced into writing.

On the other hand, the Appellant evidence at the trial court is that, the only claim the Respondent is entitled is Tshs.480,000/= In this, as said, he explained differently to the Respondent on how the said admitted sum came to be. Part of the Appellant's evidence at trial, specific at page 14 of the proceedings, reads as hereunder:

"Mwaka 2017 mwezi Machi, niliweza tena kumkopa shs.450,000/= na kila laki itazaa shs. 30,000/= elfu thelathini kwa riba. Hivyo jumla nadaiwa shilingi sabini kwa miezi miwili inakuja shs.690,000/=(laki sita na tisini) Awamu ya kwanza nilimpa sh.300,000/=(laki tatu) hivyo zikabaki sh 390,000/=(laki tatu na tisini). Hivyo, niliweza kumlipa sh.10,000/= hivyo zikabaki sh. 380,000/= ambazo ananidai bado nikakopa sh.100,000/= laki moja, jumla zinakuwa

sh.480,000/= laki nne na elfu themanini. Hivyo, deni ninalolifahamu ni sh,480,000/= baadaye tulikuja kushindwana kuishi hapo kwake kwa sababu ya bill ya umeme hazikuwa na utaratibu mzuri licha ya hapo tulishindana na mdai nikaamua kuondoka kwake. Hivyo ninachoelewa mdai ananidai sh.480,000/= (laki nne na elfu themanini). Sina Zaidi."

This evidence of the Appellant has not been contradicted. It is to say, he has managed to establish how much the Respondent claim from him. In this, the court need not be satisfied that, the proof was to be beyond reasonable doubt but which part has better evidence than the other. In this, the provisions of rule 6 of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations, GN. No.55 of 1964 states that:

"In civil cases, the court is not required to be satisfied beyond reasonable doubt that a party is correct before it decided the case in its favour, but it shall be sufficient if the weight of the evidence of the one party is greater than the weight of the evidence of the other."

With that understanding of the legal position, the two courts below had no justification to hold that the Respondent proved the claim on balance of probabilities. In the case of **Catherine Merema vs Wathaigo Chacha** (supra), at page 12 through 13, the Court of Appeal stated the following regarding proof in Civil cases:


"The law is settled that he who alleges the existence of any fact has a burden of proof as outlined under section 110 of

the Evidence Act, Cap.6 Revised Edition 2002(the Evidence Act) with the understanding that, in civil matters, it is rudimentary that the standard of proof is one on balance of probabilities, meaning that the evidence with more credence on a particular fact to be proved will be sustained by courts."

Having that position, I am of the view that the story of the Appellant has managed to establish that the claim is of Tshs. 480,000/= which he maintained all through from the trial court, the 1st appellate court and in his submissions to this court and not as alleged by the Respondent and her witnesses, contradictory though. Such consistence gives credence to that evidence, thus I have no doubt whatsoever to trust that evidence.

In the totality of all what was stated above, I find the appeal has merit and accordingly is hereby allowed. Each party to bear own costs of the appeal.

It is so ordered.


Gerson J. Mdemu
JUDGE
16/10/2020

DATED at SHINYANGA this 16th day of October, 2020.



Gerson J. Mdemu
JUDGE
16/10/2020