

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA**

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

PC CIVIL APPEAL NO 11 OF 2020

NYAMAROSO CHACHAAPPELLANT

VERSUS

REGINA MAIBURESPONDENT

*(Arising from Misc. Civil Appeal No. 91/2019 Musoma District Court original from Civil
Case No. 8/2017 at Zanaki Primary Court)*

JUDGMENT

10th & 24th November, 2020

Kahyoza, J

This is a second appeal by the appellant **Nyamaroso Chacha**. The appeal is against the decision of the District Court in favour of the **Regina Maibu**, the respondent. The appellant challenges the decision of the District Court for supporting the decision of the primary court in his first and second ground of appeal. In the third ground of appeal, the appellant contends that the District Court erred in law to support the decision of primary court, which was based on the weak evidence of the respondent.

The appellant's grounds of appeal raise two issues as follows –

- a. Was the District Court justified to rely on the primary court findings that the appellant received the respondent's money from the group?
- b. Did the respondent prove her case on the balance of probability?

Was the District Court justified to rely on the primary court findings that the appellant received the respondent's money from the group?

The appeal was heard orally and the parties were unrepresented. I will give a brief background. The appellant and the respondent were members of one group carrying on artisanal mining. It is alleged the group had 17 members. In the year 2016, the group managed to accrue proceeds from their activities. The distributed the proceeds to the members. The respondent was sick and her share was kept with the appellant who was the chairman. The respondent (Pw1 Regina) came from treatment and joined the group. The group members informed her that her share was kept with the appellant.

The respondent accompanied with two group members, Mzee Suzy and Pw3 Prosper Albert Nyanda, went to the appellant to claim for respondent's share. The respondent went with Mzee Suzy and Pw3 Prosper Albert Nyanda to the appellant. Mzee Suzy and Pw3 Prosper Albert Nyanda were the treasurer and assistant treasurer respectively. The appellant gave the respondent TZS.5,090,000/= and promised to pay the balance later. The appellant failed to pay respondent the remaining sum of TZS. 2,400,000/= to the respondent as promised.

Pw2 Joshua, the Secretary of the group gave evidence that the group accumulated TZS 129,000,000/= from their artisanal mining, after deducting expenses each member got TZS 5,290,000/=. The respondent was away attending treatment. They decided to keep her share with the chairman. They trusted the chairman. They informed the respondent to

came and collect her share. She came and the group decided to send to two people with her to demand her cash from the appellant.

During cross-examination, the Pw2 Joshua deposed that the group at first distributed to each member TZS. 1,400,000/=. They gave the respondent's share to the appellant. The appellant gave TZS. 200,000/= to the respondent and kept TZS 1,200,000/=. Later they obtained TZS 1,000,000/= each. The respondent's share was kept with the appellant. Finally, each member of the group got TZS 5,290,000/= from their activities. The respondent's share was kept with the appellant. The appellant gave TZS 5,090,000/= only in the presence of Pw3 Nyanda and Mzee Suzy. Mzee Suzy is dead.

Pw2 Joshua the Secretary of the group deposed that the appellant gave the respondent TZS 5,290,000/= in total, retaining TZS 2,400,000/= in total.

The appellant denied to receive on behalf of the respondent money from group. The appellant told the trial court that he was a chairman and that group treasurers were **Mzee Suzy and PW3 Nyanda**. He deposed that the procedure of the group was that each member was taking his share and if any person was absent his share was kept by the treasurer of the group. The appellant denied to receive the respondent's money.

The respondent's evidence was joined by Chacha Mwita one of the group members. Given the above background, I now consider the issues raised by the grounds of appeal was.

This is second appeal. It is trite law that a second appellate court can only interfere with concurrent findings of facts of the two courts or tribunals

below where it is satisfied that the courts or tribunals have misapprehended the evidence in such a manner as to make it clear that its conclusions are based on incorrect premises. **See Salum Bugu vs Mariam Kibwanga** Civ. Appeal No. 29/1992. The Court of Appeal in another case of **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores Vs. A.H Jariwalla t/a Zanzibar Hotel** [1980] T.L.R pg 31 where at page 32 the Court of Appeal stated:

"Where there are concurrent findings of facts by two courts, the Court of Appeal, as a wise rule of practicing should not disturb them unless it is clearly shown that there has been a misapprehension of evidencing a miscarriage of justice or violation of some principle of law or procedure."

In this case, the primary court found that the appellant received money on behave of respondent and failed to remit the said money. The District Court upheld the primary court's finding. I have no reason to differ with the finding of facts of two courts below. There is ample evidence, the **respondent** and Pw3 Nyanda deposed that the appellant gave the respondent **Tzs. 5,090,000/=** and promised to pay the remaining balance after two weeks. **Pw3 Nyanda** was the assistant treasurer. I see no reason why the appellant and **Pw3 Nyanda** should tell lies.

The trial court found the respondent, Pw2 Joshua and Pw3 Nyanda credible witnesses. The District Court upheld the findings. A quick review of the evidence on record depicts the strength of the evidence of this case depends on the credibility of the witnesses. It is trite law that credibility of a witness is a domain of the trial court only in far the demenour is

concerned and a first or second appellate court may determine credibility of the witnesses when assessing the coherence of the testimony of that witness and when the testimony of that witness is compared the evidence of other witnesses. See **Shabani Daudi v. Republic**, Criminal Appeal No. 28 of 2000 (unreported), the Court of Appeal propounded the manner of assessing or determining credibility of witnesses. It stated -

*"Maybe we start by acknowledging that credibility of a witness is the monopoly of the trial court but only in so far as demeanour is concerned. The credibility of a witness can also be determined in two other ways; **one, when assessing the coherence of the testimony of that witness. Two,** when the testimony of that witness is considered in relation with the evidence of other witnesses or including that of the accused person. In these occasions the **credibility of a** witness can be determined even by a second appellate court when examining the findings of the first appellate court.*

I am alive of the principle that every witness is entitled to credence and must be believed unless there are good and cogent reasons for not be believing him. I am of the firm view that though the Court of Appeal enunciated the principle in a criminal case of **Edison Simon Mwombeki v. R.**, Cr. Appeal. No. 94/2016 (CAT Unreported), it applies in civil cases.

A second appellate can determine credibility of a witness by considering the inconsistencies of witnesses or by considering the coherence of the testimony.

In this case, I have no reason to question the credibility of the respondent and her witnesses. Not only that but also **Pw2 Joshua** did tender the minutes of the group meeting Exh.P1. The secretary deposed

that the appellant failed to pay the balance to the respondent. The group convened a meeting on the **4/03/2016**. The appellant promised at the meeting that he will pay the respondent the remaining sum of money. Thirteen members of the group attended the meeting.

In the upshot, I see no reason to fault the District Court for supporting the primary court's judgment. The respondent's case is more probable than the appellant's case.

Did the respondent prove her case on the balance of probability?

The appellant complained that the District Court erred to support the primary court's judgment which was based on the respondent's weak evidence.

It is trite law that in civil claims the party who alleges must prove and do so on balance of preponderance. See **Abdul-Karim Haji v. Raymond Nchimbi Aloyce & Another**, *Civil Appeal No. 99 of 2003 (CAT unreported)* where Court of Appeal stated that-

"...It is an elementary principle that he who alleges is the one responsible to prove his allegations."

The respondent had a duty to prove the allegation that the appellant received money from the group on her behalf and wrongly converted it to his own use. I have shown above that the respondent summoned the evidence of the secretary Pw2 Joshua, this person kept recorded of all transactions of the group. He also tender Exh. "B" (Kielelezo), the minutes of the meeting of the group convened on the 4/3/2016, the appellant

admitted liability that he will pay TZS 2,400,000/= being part of the amount he received on behalf of the respondent and failed to remit. Part of the minutes of said meeting reads-

"Baada ya maelezo ya Mama Regina Mahimu ndugu Nyamaroso Chacha aliweza kupewa nafasi ya kuelezea juu ya swala hilo, na Ndugu Nyamaroso aliweza kusema ni kweli kwamba Mama huyo ananidai mgao wake Tsh. 2,400,000/= tu baada ya kuwa nimemchukuliwa mgao wake akiwa katika matibabu. Niliweza kuchukua pesa zake hizo kutokana na migao ilivyokuwa ikitokea na jumal ya pesa zilizotokana na mgao ni Tsh. 2,400,000/= na pesa hizo nilitumia kununulia karasha. Nitamrudishia aniachie muda. Alisema Ndugu Nyamaroso Chacha"

The appellant summoned Pw3 Nyanda, a person who witnessed the appellant paying the Tzs. 5,090,000/= and promising to pay the balance of Tzs. 2,400,000/= in two weeks' time. The respondent's evidence if weighed against the appellant's denial which was supported by his witness **Dw2 Chacha Mwita**, I find with no iota of doubt that the respondent's evidence was more credible, reliable and heavier than the appellant's evidence.

I see no reason why should the respondent and her witness lie against the appellant. Had the appellant any intention to lie, she would have deposed that the appellant gave her Tzs. 2,400,000/= and retained Tzs. 5090,000/=.

The appellant has reasons to tell lies. He stands to benefit by retaining TZS 2,400,000/= the respondent's property. Thus, like the District

Court, I support the primary court findings that the respondent proved her case not only on balance of probability but also beyond all reasonable doubt.

Eventually, I find that the appeal has no merit. I dismiss it. I uphold the decision of both the district and primary court. The appellant is ordered to pay Tzs. 2,400,000/= to the respondent as ordered by the primary court. The appellant is condemned to pay costs before this Court, and the courts below.

It is ordered accordingly.



J. R. Kahyoza
JUDGE
24/11/2020

Court: Judgment delivered in the presence of parties. B/C Ms. C. Tenga.



J.R. Kahyoza
JUDGE
24/11/2020