

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO.36 OF 2021

*(Originating from the Judgment and Decree of the District Court of Kinondoni District
in Civil Case No.1 of 2019 dated 28th December, 2020 and delivered by H.M. Hudl.*

RM)

ATHUMANI SENDAROAPPLICANT

VERSUS

ISMAIL HASSAN NBADJO.....RESPONDENT

JUDGMENT

MRUMA,J.

This appeal arises from a judgment of the District Court of Kinondoni at Kinondoni in Civil case No. 1 of 2019 delivered on 28.12. 2020. The Appellant was the Defendant whereas the Respondent was the Plaintiff in the said suit.

The claim arose from a plaint filed which was seeking for the following reliefs;

- a) An order compelling the Defendant to pay the Plaintiff the principle amount of the sum of Tshs 80,000,000/=as special damages for loss of money occasioned by the Defendant.
- b) An order compelling the Defendant to pay the Plaintiff the sum of

Tshs 40,000,000/= being punitive damages

- c) An order compelling the Defendant to pay to the Plaintiff the sum of Tshs 30,000,000/= being general damages.
- d) Interest on (a) (b) and (c) at the rate of Commercial bank's rate from the date of institution of the suit to the date of delivery of Judgment.
- e) Interest on the (a) (b) and (c) at the court's rate from the date of Judgment to the date of satisfaction of decree.

In a statement of Amended Written statement of Defence filed on 19th July 2019 the Appellant denied being indebted to the Respondent. He contended that there is no way can a holder of an account send a stranger to deposit money on his behalf (Account holder) on different occasions. He said that there that there was no any such arrangement between the parties.

In his judgment, the learned trial Magistrate arrived at a finding in favour of the Respondent and adjudged that there was evidence that on different occasions the Respondent gave the Appellant money for him to deposit in the Respondent's Account but the Appellant fraudulently did not deposit the money in the directed account. Further that there was an agreement signed between the parties to the effect that the Appellant would refund the Respondent of the said money but he did not. The court

found that the Respondent was entitled to refund of his Tshs 80,000,000/= and general damages of Tshs 20,000,000/=

The Appellant was aggrieved and he has appealed against that judgment citing four (4) grounds of appeal as contained in the memorandum of appeal dated 10th February 2021 and presented for filing on 12th February 2021 which are as follows;

1. That the trial Magistrate erred in both law and fact by giving Judgment in favour of the Respondent while the Respondent evidence was too weak to prove the case on the balance of probability against the Appellant.
2. The learned trial Magistrate erred both in law and in fact by recording proceedings in a manner that favours the Respondent while omitting to record some of the Appellant's material evidence the omission which weakened the Appellant's case.
3. That the trial Magistrate erred in both law and fact by denying the Appellant a full right to be heard by refusing to afford him summons for summoning his material

witness namely Fauzia.

4. That the learned trial "*Judge*" erred both in law and in fact by his failure to analyse properly the evidence tendered by the parties to the suit and their witnesses which clearly show that the Respondent had a weak case to establish legal obligations against the Appellant.

During the trial three witnesses testified for the Plaintiff's case. On top of himself he called two other witnesses namely Malisa Halifa Mshana (PW2) and Christian Mwakienda (PW3). PW1 Ismail Hassan Mbadjo the plaintiff who testified as PW1 testified that the Appellant who was the Defendant was his neighbor in Sinza area where they were both living since their childhood. He said that he was operating a clearing agency business which he started in 2005. Because he was working in his office till late hours, he used to ask the Appellant to assist him to deposit some monies in his bank account with CRDB. It was the evidence of the Respondent that on various dates the Appellant did deposit money (exhibit P1) in the Respondent's Account number 01J2080264700 in the names of Ismail Hassan Mbadjo. He tendered in evidence bank slips which bears the names of the Appellant as the depositing customer. They

also bears his signatures. It was further evidence of the Respondent that due to a trust that existed between him and the Appellant there was a time when whenever he wanted to deposit money in his account he would just phone the Appellant and give him some cash to deposit in that account. The Appellant did not deny that evidence. He said that in December 2017 he went to CRDB Lumumba branch with the view to check his balance in the account. But he was surprised to find that he had a balance of Tshs 625,000/= only. He inquired from the Appellant who admitted that he had not deposited the money he was given to deposit in that account. Few days later the Appellant refunded Tshs him Tshs 15,000,000/= as a part payment towards a refund of the full amount of Tshs 80,000,000/= he had appropriated from the Respondent. The Respondent acknowledged to have received the money.(Exhibit P2)

On 18.3.2018 the Respondent and the Appellant met at their friend's residence at Mwananyamala with the view to see how they could settle their differences amicably. In that meeting the Appellant conceded to have used the Respondent's money and agreed to refund him Tshs 80,000,000/=The agreement which was reduced into writing was witnessed by Fauzia Bano, Marisa H. Mshana (PW2) Christian Mwaikenda(PW3) and Suleiman A. Swai . The agreement was admitted in evidence as exhibit P3.

In his defence, the Appellant who testified as DW1 denied the Respondent. He told the Court that the Respondent was his friend and that Respondent has an account with CRDB where he, the Appellant was working. It was further evidence of the Appellant that the Respondent gave him Tshs 80,000,000/= in order to deposit in his account but because he was indebted to the tune of the same amount i.e. Tshs 80,000,000/= he agreed with the Respondent to prepare a certain deal which he didn't disclose.

By consent this appeal was argued by way of written submissions. The Appellant filed his submissions on 24th May 2022. He submitted on grounds no 1 and 4 jointly and then moved to ground No.2 and 3 which he also submitted jointly.

Submitting on 1st and 4th grounds, the Appellant contended that the trial court gave judgment in favour of the Respondent on a very weak evidence because there was no documentary evidence which proved that the Respondent gave him Tshs 80,000,000/= as alleged and that the two witnesses called by the Respondent did not witness the Respondent giving him that money. The Appellant contended further that witnesses who ought to have been called were supposed to be those who were actually present and who saw all the purported transactions including

Faudhia in whose house the meeting was conducted and an advocate whose rubber stamp was used in purported acknowledge papers (exhibit P2) and all 7 persons who attended the meeting at Faudhia's house.

On the second ground it was submitted that the trial Magistrate erred in both law and facts by recording proceedings, in a manner that favoured the Respondent while omitting to record some of the Appellant's material evidence the omission which weakened the Appellant's case. It is the Appellant's contention that his evidence was recorded in a way that one can apprehend that the Appellant was given the said money (Tshs 80,000,000/=) to deposit in the Respondent's bank account while at the bank premises but while in fact it was not in that way.

On the right to be heard, the Appellant contended that the trial Magistrate refused to give him summons to call his material witness one Faudhia.

I beg to start with this ground. Summons is a writ (i.e order) issued by court requiring a person to appear in court for purposes mentioned therein. Witness summons is therefore an order compelling a person from whose lips testimony is extracted to be used in judicial proceedings to appear before the court and testify. That person is called a witness. In civil cases the duty to call or summon witnesses is on the party in whose favour the witness will testify and in practice he/ she so do voluntarily.

This does not mean that all witnesses will voluntarily be willing to present themselves in court and that is where the issue of issuance of summons comes in. Where a material witness is not willing to appear in court and give his testimony or due to the nature of his work she/he needs to get permission of the employer before she/he can appear in court for that purpose a party in whose favour the witness may testify may apply for issuance of witness to request her/ him to appear. In the present proceedings no such request was made. Although at the first pretrial conference and scheduling order the Defendant intimated that he may call not more than three (3) witnesses. On 17.12.2020 after he had completed giving his defence, his advocate, Mr. Kyaruzi, prayed to closed the defence, case. Accordingly the case was closed. There were therefore no request for issuance of summons for his witness and because it is not stated as to why the intended witness would need summons before marking appearance I find this complaint to be an afterthought and I dismiss it.

Regarding failure to analyse the evidence, it is now settled principle that the first appellate court may re- evaluate the evidence tendered during the trial and come out with its own conclusion of the matter though it will not normally interfere with the finding of fact by the trial court unless it is based no evidence or on misapprehension of the

evidence. I have considered the evidence adduced before the trial court as well as the respective rival submissions. I would conclude that on the evidence obtained in exhibits P1, P2 and P3, the Respondent proved his claim on the balance of probability. In exhibit P3 for instance the Appellant signed a document in which he admitted the Respondent's claim and he promised to refund the amount stated therein in four instalments. The signing of that document was witnessed by Marisa Halifa Mshana (PW2) and Christian Mwaikenda (PW3). Both Malisa Mshana (PW2) and Christian Mwaikenda (PW3) testified in this case and confirmed that they witnessed the signing of that document. The cross-examination questions did not challenge their testimonies particularly on the point that they were present and that they witnessed when the Appellant was signing the document. The document (exhibit P3) which is in the Appellants own words states in Kiswahili that:

"18/03/2018 09: 15 PM)

*Mimi Athmani Sendaro nadaíwa fedha
taslim shilingi million Themanini
(80,000,000/=) na ndugu Ismail Hassan
Mbajo. Naahidi mbele ya kikao hiki leo
tarehe 18/3/2018 kwamba nitailipa fedha
hizo kwa awamu nne kuanzia mwezi April*

mwishoni (30/4/2018).

Pia kama kutakuwa na mabadiliko yoyote ya malipo yaani kupata pesa mapema tutaarifiana ili kupunguza deni hilo kwa Ismaili Hassan.

Mdaiwa : Athman Seudaro (sgd)

Mdai : Ismail H. Mbayo (sgd)

Mashahidi:

- 1. Faudhia Banu(sgd)*
- 2. Patso(Sgd)*
- 3. Marisa H. Mshana.....(Sgd)*
- 4. Christian A. Mwaikendo.....(sgd)*
- 5. Suleiman Amani Swai.....(Sgd)*

The Appellant didn't dispute the fact that he was the author of exhibit P3 or that he signed it. He didn't. He didn't do so in his amended written statement of defence or in his testimony during defence.. He cannot therefore be heard complaining that the trial Court didn't properly analyzed the evidence on record. Exhibit P3 is simply and clearly an admission on the part of the Appellant. Unless it is disputed, it does not need any analysis.

Finally on the reliefs, the learned trial magistrate on top of Tshs 80,000,000/= which formed the Respondent's basic claim, awarded Tshs 20,000,000/= as general damaged. He did not give any explanation which could justify that award. General damaged are that damages that the law presume to follow from the type of wrong complained of but specifically they are compensatory damages for harm that results from the tort for which a party has sued. Thus, before awarding general damages court must be satisfied that the claimant has suffered harm which has not been compensated by award under other heads of damages, for instance personal bodily injuries as or rep.

In the instant proceedings refund of Tsh 80,000,000/= plus interest at court's rate of 7% per annum from the date of Judgment to the date of full satisfaction of the decree were sufficient to adequately compensate the Respondent. Thus, with exception of an award of general damages of Tshs 20,000,000/= which is quashed and set aside, the Appellant's appeal is dismissed with costs.

Order accordingly.



A handwritten signature in blue ink, appearing to read "Mruma".

A. R. Mruma

Judge

20/7/2022

20/7/2022

Coram: Hon. A. R. Mruma,J

For the Appellant: Absent

For the Respondent: Mr Jama Arthur for Respondent

Cc: Delphina

Court: Judgment delivered



A handwritten signature in blue ink, appearing to read "A. R. Mruma".

A. R. Mruma

Judge

20/7/2022