

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**IN THE SUB-REGISTRY OF MWANZA**  
**AT MWANZA**

**CIVIL APPEAL NO. 35 OF 2021**

**ROJAS FORTUNATUS ..... APPELLANT**

**VERSUS**

**EVA LUDIGIJA .....RESPONDENT**

**JUDGMENT**

*22<sup>nd</sup> September & 7<sup>th</sup> February 2023*

***Kahyoza, J.:***

**Eva Ludigija** sued **Rojas Fortunatus** and **Claudius Mkatakiu** successfully before Chato District court. She claimed Tzs. 7,225, 000/= as unpaid loan and general damage at tune of Tzs. 4,500,000/=. The trial court found that **Eva Ludigija** advanced Tzs. 7,225, 000/= to **Rojas Fortunatus** and **Claudius Mkatakiu**, which they refused to repay. It ordered **Rojas Fortunatus** to pay the loan money plus general damages assessed at Tzs. 2,500,000/=. The suit proceeded *ex parte* against **Claudius Mkatakiu** who was reported sick. The trial court passed a decree against both defendants.

Aggrieved, **Rojas Fortunatus** appealed to this Court raising three grounds of appeal. During the hearing of the appeal, the appellant's advocate, Ms. Beatrice abandoned the first ground of appeal. She retained

the second and third grounds of appeal, which are as follows-

2. That the trial court failed to analyze and consider the weight of the evidence given by the respondent and the appellant herein in reaching his judgment contrary to the rule of balance of probability in the case of civil nature.

3. That the trial court erred in law and fact for considering the evidence of the respondent herein which are full of contradictions and unreliable.

Briefly, **Eva Ludigija's** evidence was that **Rojas Fortunatus** requested a loan to boost his business. They agreed on the terms of the loan. She gave Tzs. 7,225, 000/= to **Rojas Fortunatus**, himself and some through **Claudius Mkatakiu** who was **Rojas Fortunatus'** friend. She tendered one documentary evidence issued by Vodacom-Mpesa to prove that she sent money through Vodacom agents to **Rojas Fortunatus's** tell phone numbers. She also deposed that she sent money to **Rojas Fortunatus's** telephone numbers.

**Rojas Fortunatus**, the appellant, denied the claims and deposed that **Eva Ludigija**, the respondent, was his former female friend. He did not borrow from her. He deposed that his status enabled to approach any financial institution to obtain a loan if he wished.

### **Did the trial court consider and analyze the evidence?**

**Rojas Fortunatus's** advocate complained that the trial court did not

analyze and consider weight of the evidence of both side. She contended that respondent did not discharge her duty to prove the allegation of advancing a loan of Tzs. 7,22,000/=. To support her submission, she cited sections 110 and 111 of the Evidence Act, [Cap. 6. R.E. 2022] and the case of **Anthion M. Masaga Vs Penina (Mama Mgesi) and Lucia (Mama Anna)** Civil Appeal No. 118 of 2014 CAT (Unreported). She added that evidence on record shows that the respondent only sent Tzs. 28,000/= directly from her cellphone. Exh. P. 1 did not establish that she sent an amount Tzs. 7,222,000/= to the appellant.

**Eva Ludigija's** advocate, Mr. Salilo submitted the trial court properly analyzed the evidence and found that the respondent advanced money to the appellant. He submitted that there was evidence to show that the respondent sent money to the appellant via Vodacom M-pesa agents and some of the money were sent to the appellant's friend. He averred that Philipo Luhenge (Pw2) proved that the respondent gave him money which he sent to the appellant.

To say the least, the trial court did not properly analyze the evidence and determine its weight. I am in total agreement with the appellant's advocate that had the trial court considered the evidence properly it could not have reached the conclusion it attained. It is our cherished principle of

law of evidence as submitted by the appellant's advocate, that, generally in civil cases, the burden of proof lies on the party who alleges anything in his favour as it was stated in **Anthon M. Masaga Vs Penina (Mama Mgesi) and Lucia (Mama Anna)** (supra) and Sections 110 and 111 of **the law of Evidence Act. Eva Ludigija** had a duty to prove the existence of an oral or written loan agreement between her and the appellant. I could not find any such evidence. She did not plead where and when they meet physically or otherwise to agree for loan agreement. There is no evidence to prove how much was agreed to be advanced as loan.

The respondent failed miserably to prove how much was sent to the appellant. She had no record. The respondent did adduce evidence to prove how much she disbursed to the appellant as loan. She sought to prove that she sent money to the appellant through exhibit P1., statement of transaction. She alleged that she sent money to the appellant using agents. The respondent may have used the said M-pesa agents deposit money to his own mobile account.

In addition, even if we find it proved that she sent money to appellant through agents that evidence could not establish that he sent Tzs. 7,222,000/=. If person alleges that he gave a loan or to another person he should specifically prove it.

Worse still, looking at the transactions the respondent allegedly made to advance money to the respondent, I find it highly doubtful whether the respondent gave the appellant money as loan. If it is true that she gave the appellant the claimed amount of money, she must have dished out that amount of money for a purpose other than as a loan to be repaid. I am of such opinion because the amount sent does not reflect that the respondent was all out to advance money to the appellant to boost the latter's business. The respondent's evidence indicated that she sent such an amount that would not have assisted the appellant to conduct business. It is on record that the respondent sent to the appellant Tzs. 5,000/= or Tzs. 2000/=. It is recorded that the respondent sent Tzs. 3,000/= to the appellant through his co-defendant on 27/2/2018, on 7/10/2018 sent to the second defendant through Masumbuko M Mahabui Tzs. 5,000/=:, on 12/9/2018 sent Tzs. 3,000/= to the second defendant through Jumamne, on the same date, that is on 12/9/2018 sent another Tzs. 2,000/= to the second defendant through Jumamne. She further alleged that on the on 1/9/2018 sent Tzs. 5,000/= to the second defendant through agent Jumamne and that on the 2/9/2018 sent Tzs. 3,000/= to the second defendant through agent Jumamne Yusuf. If it is true that the respondent sent the alleged amount of money it should have been for something else and not a loan to boost the business.

The respondent showed that there was a reasonable amount transacted through the appellant's mobile cellphone number. All the same there is no evidence to prove that it was the respondent who made the transaction. She did not plead facts in the plaint showing the date and the amount of she disbursed to the appellant. She only proved the amount advanced to the appellant after obtaining the appellant's financial statement from M-pesa Vodacom. She had no record.

I find that the respondent did not discharge her duty to prove by balance of preponderance that there was a loan agreement between her and the appellant. She failed also to prove that she advanced money to the appellant to the tune claimed or at all. For that reason, I uphold the first ground of appeal that the trial court failed to analyze and consider the weight of the evidence.

### **Did the trial court err to rely on the respondent's evidence?**

The appellant complained that the trial court erred in law and fact for considering the evidence of the respondent, which is full of contradictions and unreliable. She submitted that the respondent testified that she sent money through Vodacom M-pesa agents and mentioned the dates and the amount she sent. Her witness Philipo Luhenge (**Pw2**) gave contradicting evidence as to the dates and the amount he got from the respondent and

sent to the appellant. He submitted that the contradiction was fundamental, thus, raising a question of credibility of witnesses. She cited the case of **Chacha Matiko @Maguge v. R.**, Cr Appeal No. 293/2020 to support her contention that fundamental contradictions in the evidence affect credibility of witness.

The respondent's advocate refuted the allegation the respondent and her witnesses were not credible. He submitted that they were credible and that is why the trial court did not doubt their credibility.

Having heard arrival submissions, I wish to point out that the appellant's advocate did not point out the contradictions between the respondent and her witness. However, this being the first appellate court tasked with a duty to re-evaluate the evidence, I resolved to re-examine the evidence. I did not see contradicting evidence rather I found that there was no evidence to support the trial court's conclusion. Philipo Luhenge (**Pw2**) testified to have made four transactions on behalf of the respondent by transferring money to number 0754 204 480 the registered owner being Rojas Kagog. Philipo Luhenge (**Pw2**) deposed further that the respondent gave him money to transfer to the same cellphone number 0754 204 480 on several other occasions as follows, Tzs. 2,000,000/= on 25.4.2017, Tzs. 1,500,000/= on 17.6.2018, Tzs. 2,000,000/= on 28.6.2018 and finally he sent

Tzs. 3,000/= on 16.7.2018. Philipo Luhenge (**Pw2**) testified without referring to any document. During cross-examination, Philipo Luhenge (**Pw2**) deposed that he had left documents to prove the transactions in his office.

The respondent did no mention to have made any transaction on the dates mentioned by Philipo Luhenge (**Pw2**). Philipo Luhenge (**Pw2**) was an employee of **Masanja Edward Vodacom-Mpesa Agent**, thus, transacting the business of Vodacom-Mpesa Agent for people requiring such services. I wonder why did Philipo Luhenge (**Pw2**) keep the respondent's transactions in his memory for a period of more than two years. Philipo Luhenge (**Pw2**) alleged that the respondent transacted from 2017 and up to July 2018 and he testified on 10.2.2021. Philipo Luhenge (**Pw2**)'s evidence was too sweet to be true unless he used to deal only with the respondent or he had undisclosed reason(s) memorize the respondent's transactions. Philipo Luhenge (**Pw2**)'s evidence had no weight as the respondent (the Plaintiff) neither pleaded those facts in the Complaint nor gave evidence to point out the transactions she made and made through Philipo Luhenge (**Pw2**). She simply testified that some of the transactions she made could not be proved by the evidence from Vodacom.

To make things worse the respondent, a person who advanced a loan to the appellant never kept records to indicate the amount and the date she



advanced a given amount to the appellant. She relied on the third party's record to establish how much she advanced and when. The third party informed the court that his policy does not require him to keep M-pesa transactions record for more than a year. Thus, the record obtained from Vodacom M-pesa (Exh.P.1) did not support Philipo Luhenge (**Pw2**)'s evidence regarding M-pesa transactions. The trial court erred to give weight to Philipo Luhenge (**Pw2**)'s evidence and rely on such evidence to hold that the respondent sent some considerable amount as a loan to the appellant. I uphold the second ground of appeal.

In the end, I find that if the trial court had properly evaluated the evidence and made a determination of the weight to attach to the respondent's evidence, it could not have decided in her favour. The respondent did not prove her claims to the balance of preponderance, which is the required standard of proof in civil cases.

In civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on a balance of probabilities, the position stated by the Court of appeal in the case of in **Anthony M. Masanga versus Penina (Mama Ngesi) and another**, Civil Appeal No. 118 of 2014 (unreported) and many other cases.

I find that the trial court erred to decide in favour of the respondent

who did not discharge her duty to prove her claims on the balance of preponderance. I will add that, given the nature of the respondent's claim that is she advanced a loan amounting to Tzs. 7,222,000/= to the appellant, the respondent's claim was a specific one. She therefore had a duty to prove the claim specifically. If a person advanced a loan that person should not beat around to establish that fact.

In the end, I find that the respondent did not prove her claims. Thus, the trial court erred to decide in her favour. I uphold the appeal, quash, and set aside the judgment and decree, respectively of the trial court. Given the undisputed relationship between the parties, each party shall bear its own costs.

It is so ordered.

**Dated** this 7<sup>th</sup> day of February, 2023.



A handwritten signature in black ink, appearing to read "J.R. Kahyoza", written over a horizontal line.

**J.R. Kahyoza**  
**JUDGE**

**Court:** Judgment delivered in the absence of the parties as they could not joint to the virtual court.

A handwritten signature in black ink, appearing to read "J.R. Kahyoza", written over a horizontal line.

**J.R. Kahyoza**  
**JUDGE**  
**7/02/2023**