IN THE HIGH COURT OF TANZANIA
(DODOMA DISTRICT REGISTRY)

AT DODOMA
PC CIVIL APPEALNO.8 OF 2017

(Arising from the Decision of District Court of Dodoma at Dodoma in Civil Appeal No. 60 of 2018 which originated from the Decision of Dodoma Urban Primary Court in Civil Case No. 140 of 2018)

HASSAN HUSSEIN ..... APPELLANT

VERSUS

IRENE LAZARO MWAKALUKWA ..... RESPONDENT

JUDGMENT

7th December,2020 & 12th February,2021

M.M. SIYANI, J.

This appeal was lodged by Hassan Hussein challenging the decision of District Court of Dodoma at Dodoma against the respondent one Irene Lazaro Mwakalukwa. The petition of appeal contains four grounds of appeal as follows:

1. ***That,*** *the trial Magistrate erred in law and fact for not considering the fact that the Respondent failed to prove her case on balance of probabilities;*
2. ***That,*** *the trial Honorable Magistrate erred in law and fact for considering the documents which were*

tendered as exhibits by the Respondent, of which the appellant signed under coercion;

3. ***That,*** *the trial Honorable Magistrate erred in law and fact by deciding in favour of the Respondent basing on weak and contradictory evidence adduced by the Respondent's witnesses;*
4. ***That,*** *the trial Honorable Magistrate erred in law and fact delivering judgment in favour of the Respondent without considering strong evidence adduced by the appellant.*

By the leave of the Court and since both parties were duly represented by counsel, the appeal was argued by way of filling of written submissions. Through the filed written submissions, the appellant who enjoyed the services of counsel Godfrey Wasonga, combined his argument in respect of the four grounds of appeal. As the gist of the appeal was on the amount of money allegedly borrowed by the appellant from the respondent, counsel Wasonga contended that the burden was on the respondent to prove that she was a financial institution licensed to carry money lending business in accordance with the law under section 6 of Banking and Financial Institutions Act 2006. It was submitted that in absence of

a valid license to lend money, any agreement between parties herein was invalid and to support his contention, the learned counsel referred the cases of **ULF Nilson Vs Dr Tito Mziray Andrew,** Land Case No. 66 of 2007, High court Dar es salaam (unreported), which cited the cases of **Edge-Low Vs Macelwee** (1918) 1 K.B 205 and **Bafour Vs Yeboah Ameyew,** African Law Report 423.

Counsel Wasonga went on to submit that both the trial court and the first appellate court, wrongly decreed in favour of the respondent whose evidence was contradictory as to the amount allegedly given to the appellant. He further argued that it was even wrong for the courts below to rely on evidence of admission made before the police officers and extra judicial statements. It was contended that the appellant was not a free agent when making the statements before the police officers hence contravening section 12 of the law of contracts Act Cap 345 RE 2019. In view of the learned counsel, such a practice of using interrogations made at the police station and extra judicial statements to prove a civil case, was strange one and totally un recognized by the law.

Finally, it was submitted by Mr. Wasonga that the trial primary court relied on electronic evidence without considering its reliability as provided under section 18 (2) (a) (b) and (c) of the Electronic Transaction Act No. 13 of 2015. The learned counsel therefore urged the court to expunge from the record both the electronic evidence, extra judicial statements and the appellant's statements recorded at the police station.

Responding the above arguments, counsel Isaya Nchimbi who represented the respondent, submitted that the appellant misdirected himself by considering the respondent as an entity governed by the Banking and Financial Institutions Act, 2006. According to him, the Banking and Financial Institutions Act does not prohibit an individual to lend money among them rather what is prohibited is receiving deposits and lending money with interest without having a license. While referring the same case of **ULF Nilson Vs Dr Tito Mziray Andrew** (supra), counsel Nchimbi argued that being not a financial entity, the respondent was not bound by any of the provisions of the Banking Financial Institutions Act. It was submitted that parties to this appeal were under the contract of lending money which was defaulted by the appellant Mr. Nchimbi believed that the evidence tendered

during trial proved the suit in favour of the respondent on the balance of probabilities. Such evidence according to Mr. Nchimbi, included a contract (exhibit P2) through which the appellant admitted to have been indebted by the respondent to the tune of Tshs 13,600,000/=. The learned counsel maintained that exhibit P2 was entered by the parties herein freely, meets all the requirements of valid contract and therefore the trial court was justified to act on it.

I have considered the record and the rival arguments as presented by their counsel. In essence all the four grounds of appeal are on facts and how the courts below exercised their power of evaluating evidence. This is a second appellate court which cannot interfere with the concurrent findings of facts by the courts below unless it is shown that there has been a misapprehension of the evidence, a miscarriage of justice or a violation of the principle of law or practice. See **Amratlal D.M t/a Zanzibar Silk Stores Vs A.H. Jariwala t/a Zanzibar Hotel** [1980] TLR 31. In the instant matter, the both the trial and the first appellate court had a concurrent finding that parties herein had entered into a contract where the appellant borrowed the sum of Tshs 13,600,000/ from the respondent. As correctly observed by the

lower courts, the fact that parties herein entered into an oral agreement where the appellant borrowed some amount of money from the respondent, was not an issue. The appellant himself admitted so through his defence testimonies and as such, the suit was therefore proved as to the existence of a loan agreement between parties herein.

That notwithstanding, there was a contention on the extent of the loan advanced to the appellant and the sum that remained unpaid. While the appellant admitted the loan at the sum of Tshs 4,100,000/=, the respondent maintained that outstanding debt was Tshs 13,600,000/=. In reaching into a conclusion that the appellant borrowed Tshs 13,600,000/= from the respondent and that the same amount remains unpaid, both the first appellate court and the trial court, relied on the contents of exhibit P2 and P3. While exhibit P2 was the appellant's written acknowledgment of the debt to the tune of Tshs 11,000,000/=, exhibit P3 was his extra judicial statement made before a justice of peace where among others, he retracted the contents of exhibit P2 on the reason that he was not a free agent when signing the same.

In my considered opinion, the fact that the appellant retracted the contents of exhibit P2, shows he was free before a justice of peace than before the police officers. This is because, even in criminal cases where confessions before police officers and justice of peace are known as compared to civil litigations, admissibility and reliability of the same depends on their voluntariness. Our criminal jurisprudence recognises a voluntary made confession to be the best evidence but where a confession is retracted, such evidence cannot form a basis of conviction unless it has been competently corroborated. I therefore agree with counsel Wasonga that the use of whatever forms of admissions made before police officers and justice of peace to prove a civil suit, is strange procedure in civil jurisprudence. That notwithstanding, even if the position with regard to the use of such confessions would have been the same in both criminal and civil cases, still exhibit P2 and P3 was wrongly relied by the courts below for want of corroboration following its retraction by the appellant.

The trial court also admitted as evidence, Short Message Services (exhibit P1) which comprises of SMS printed from the respondent's phone. It was alleged that the printout, covered her conversations with the appellant. I

have gone through the contents of exhibit P1. The same indicates that the appellant's outstanding debt was Tshs 14,090,000/=. This figure is different to what the respondent claimed at the trial court which is Tshs 13,600,000/=. Clarifying how the loan reached Tshs 14,090,000/=, the respondent stated the following through the printed SMS:

> ***PESA NINAZO KUDAI NI HIZI***
> *1: Sh. 6,000,000/= Hela ya U-Fresh*
> *2: Sh. 5,000,000/= Hela ya kukopesha*
> *3: Sh. 2,600,000/= Hela uloongezea kwenye gari Mark X*
> *4: Sh. 400,000/= Deni nililokukopesha milioni 1.*
> *5: Sh. 40,000/= Deni la mafuta ya kupaka*
> *6: Sh. 50,000/= Nilikukopesha kwa ajili ya kupeleka polisi*
> ***TOTAL= 14,090,000/=***

As it can be seen from the above extract, the respondent appeared to have supplied a loan of Tshs 14,090,000/= to the appellant in the manner prescribed thereto. However, in the course of his testimonies before the trial court, the respondent had a different version of story. For easy of reference, I have reproduced the contents of her testimonies as hereunder:

> *Nilimkopesha SU1 Tshs 7,600,000/=, alinirudishia Tshs 5,000,000/= ikawa imebaki Tshs 2,600,000/=.*

Tarehe 10/4/2016 nilimkopesha tena Tshs 4,000,000/=. Tarehe 16/8/2016 alichukua Tshs 300,000/=. Tarehe 17/8/2016 alichukua Tshs 1500,000/=. Tarehe 20/8/2016 alichukua Tshs 400,000/=. Jumla alinirudishia Tshs 200,000/=. Jumla ya deni ikawa milioni kumi na tatu na laki sita.

Having examined these two pieces of evidence, it is clear that there was inconsistency in the respondent's story on the extent of the loan supplied to the appellant. It is unknown, if the amount due to her, is Tshs 14,090,000/= as per exhibit P1 or Tshs 13,600,000/= as per his testimonies in court. Such contradictory evidence was also wrongly relied by the trial court.

That above being said, it's my finding that both the first appellate court and the trial court, violated the principle of law and practice by relying on a confession of a civil debt made before the police officers and which was later retracted and therefore as it was observed in the cases of **Amratlal D.M t/a Zanzibar Silk Stores Vs A.H. Jariwala t/a Zanzibar Hotel** (supra), **Edwin Mhando Vs Republic** [1993] TLR 174**, Joseph Leko Vs Republic,** Criminal Appeal No. 124 of 2013 CAT at Arusha, **DPP Vs Jafari Mfaume Kawawa** [1981] T.L.R.149 and **Salum Mhando Vs Republic** [1993] TLR

170, where there are such mis directions or misapprehension of evidence leading to miscarriage of justice or a violation of some principle of law practice, this being a second appellate court, is entitled to intervene and make its own findings.

Having said so, apart from exhibit P2, there was no other evidence tendered to support the respondent's claim on the amount of the outstanding debt except the appellant's admission of the same to the tune of Tshs 4,100,000/=. I therefore find merits in the appeal which is now partly allowed to the extent of the amount due to the respondent. It is hereby ordered that the respondent be paid by the appellant, the sum of Tshs 4,100,000/= which was admitted by the later. Considering the nature and circumstances of this matter, I order each part to bear its costs of this appeal. It is so ordered.

DATED at **DODOMA** this 12th February,2021

M.M. SIYANI

JUDGE