IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

PC CIVIL APPEAL NO. 81 OF 2020

(Arising from a judgment of the District Court of Nyamagana in Civil Appeal No. 6 of 2020, by Hon. JAGADI-RM, originating from the decision of Mwanza urban primary court in Civil Case No. 39/2020 decision dated 08/01/2020 by Hon. LUBULILA-RM)

ABIUS ERASTO ..... APPELLANT

VERSUS

JOSEPH CHILYA ..... RESPONDENT

JUDGMENT

16th & 26th February, 2021

RUMANYIKA, J.:

From the dated 08/01/2020 of decision of Nyamagana primary court, the 2nd appeal is against judgment and decree of Nyamagana district court (Jagadi, RM) dated 19/08/2020 with respect to the claims of shs. 5,000,000/= against Abius Erasto (the appellant) the court having had upheld it in favour of Joseph Chilya (the respondent).

Messrs Bitunu Msangi and J.M. Ryoba learned counsel appeared for the appellant and respondent respectively and, in a nutshell they submitted as under:-

MS. Bitunu learned counsel submitted: **(a)** that Contrary to Sections 3(2) (b) and 112 of the Evidence Act Cap 6 R.E. 2019 the respondent's

claims of shs. 5.0 million it was not on the required balance of probabilities proved because the respondent only had oral/plain statements except copies of the receipts and Money Gram tendered in court alleged sent by the respondent to pw2 (the middleman) **(b)** that with respect to recipient of the money, the respondent's was mere hearsay evidence **(c)** that unlike the courts below found and held, actually the appellant did object the documents but he was overruled.

On reply, Mr. J. M. Ryoba learned counsel submitted; **(1)** that through Exhibits P1 and P2 one having had acknowledged receipt of the money but the appellant defaulted, the latter apologized therefore the case was proved on the balance of probabilities **(2)** that the appellant having acknowledged receipt of the money as per Exhibits "P1" and "P2" but defaulted and he apologized, strictly the oral agreement was no longer oral **(3)** that indeed the exhibits had passed not objected save for the amount of money (shs. 2.0 million not 5.0 million) much as like in a written form, equally oral contracts bind provided that the same were made voluntarily made by the parties.

Very briefly, the evidence on record ran thus:-

Sm1 Joseph Chilya stated that in 2017, by way of Money Gram, but through gentleman's agreement he lend the appellant sum of money for one year term and the appellant acknowledged receipt of the same but he defaulted and turned hostile only that when he now sense a police case he apologized (eight (8) copies of print outs – Exhibit "P2").

Sm2 Tumaini Deonatus stated that from the respondent, who he knew since the year 2016, through Money Gram he received the money and gave it to the appellant.

Sm3 Ladislaus Mnaku testified materially the same as Sm1's evidence. That is it.

Su1 Abius Erasto denied the entire claims and stated that he had at no point in time or anywhere borrowed or received the money that if anything, he was only fixed because the two had some disputes.

It appears on balance of probabilities convinced, like the trial court did the 1st appeal court found and held that sufficed the respondents' implied admission of the debt (Exhibit "P1" and "P2").

The central issue is whether the respondent had proved his case on balance of probabilities. The answer is, with greatest respect yes because;

One; as defined, it is only voluntariness "consensus Idedum" of the parties to the contract that counts whether or not in written form witnessed by 3rd party or not it is immaterial.

Two; looking at the eight emails (Exhibit "P2") all the time, and, on different occasions between 12th October – 18th October, 2019 (inclusive of the dates) the appellant did apologize although out of it all no single print out revealed the reasons for apology, the same closely coincided with 03/01/2020 when the case was instituted against him.

Three; as said, there might have been some other and different issues that triggered the suit against one yes, but for the reasons known to him, it being during the evidence in chief or cross examination, the appellant did not even impliedly tell what was such other disputes! Much as, like the two courts below concurrently found, the appellant did not, in any way impeach or disown pw2 sufficiently enough to the degree reasonably expected of him.

Four; it is trite law that very seldom than not a 2nd appeal court reversed concurrent factual findings of the two courts bellow unless there was, to the satisfaction of the court, which is not the case here; **(a)** that

there was misapprehension of the facts and evidence **(b)** that the evidence was fraudulently procured **(c)** that the decision was reached "per incuri am" categories not closed. It needs no over emphasis that the instant appeal did not meet the legal requirement and threshold.

In the upshot, the devoid of merits appeal is dismissed with costs. Decision of the 1st appeal court is, for avoidance of doubts upheld. It is so ordered. Right of appeal explained.

S. M. RUMANYIKA

JUDGE

21/02/2021

The judgment is delivered under my hand and seal of the court in chambers this 26/02/2021 in the absence of the parties.

S. M. RUMANYIKA

JUDGE

26/02/2021