IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

PC. CIVIL APPEAL No. 84 OF 2020

(Arising from the decision of the District Court of Nyamagana at Mwanza in Civil Appeal No. 18 of 2020, Originating from Mwanza Urban Primary Court in Civil Case No. 448 of 2019)

CHRISTINA THOMAS ..... APPELLANT

VERSUS

JOYCE JUSTO SHIMBA ..... RESPONDENT

J U D G M E N T

Date of the last Order: 25.05.2021

Date of the Judgment: 28.05.2021

A. Z. MGEYEKWA, J.

The appellant appealed against the judgment of the District Court of Nyamagana at Mwanza in Civil Appeal No.18 of 2020, which was decided in favor of the respondent. The background to this appeal is briefly that, the respondent filed a Civil Case No. 448 of 2019 before the Mwanza Urban Primary Court against the appellant claiming the from the appellant Tshs. 2,230,000/= being the remaining unpaid sum owed to the

respondent from the total of advanced monies at a tune of 7,500,000/=. The first trial court decided in favor of the respondent. The appellant could not see justice and appealed to the District Court of Nyamagana at Mwanza vide Civil Appeal No. 08 of 2018 which upholds the decision of the 1st trial court. Aggrieved, the appellant decided to file this instant appeal before this court comprising three grounds of appeal as follows: -

1. *That the District Court erred in law and fact by accepting the electronic evidence via Text Message without considering the degree of accuracy of such information and appropriate procedures for tendering the electronic evidence.*
2. *That the district court erred in law and fact for reaching in his decision by basing on the respondents fabricated evidence which did not show the correctness of a transaction.*
3. *That the trial Magistrate erred in law and fact by skipping over some important facts which were conversed during the hearing as the result, the trial court reached a biased decision.*

The appeal was argued before me on 25th May, 2021. Hearing of the appeal was done virtually through audio teleconference whereas the appellant afforded the service of Mr. Linus learned counsel. The matter proceeded *exparte* against the respondent. There is no dispute that the respondent, by way of publication in Kiswahili tabloid, *Mwananchi*

Newspaper of, respectively, 01st May, 2021 was served. I am alive to the fact that the respondent was notified through the said publication to appear on 27th April, 2021 when this case was fixed for hearing and the respondent was so informed through the said publication. However, the respondent did not appear on the slated date and the case was fixed hearing on 25th May, 2021 during which, again, the respondent did not appear. Having regard to the entire circumstances of this case, I am of the considered view that the respondent was duly being served therefore, I grant the appellant's prayer to proceed *exparte* against the respondent.

Submitting on the 1st ground, Mr. Linus avers that, the trial court did not direct itself well in the admissibility of the electronic evidence. He went on that, the trial court admitted electronic evidence c/s 18(2) and (3) of the Electronic Transaction Act No 13 of 2015 which requires that the affidavit that clearly shows the machine in which the evidence was taken, the date which the document was printed and that it was not tempered. Fortifying his submission he cite the case of **Exim Bank (T) Limited v Kilimanjaro Coffee Limited** HC, Commercial Division No. 29 of 2011.

With respect to the 2nd ground of appeal, the learned counsel for the appellant complained that the trial Magistrate erred in law and fact for reaching his decision basing on the respondent's fabricated evidence

which did not show the correctness of the transaction. Mr. Linus contended that the trial Magistrate holding that the transaction arose from the loan while the proceedings are silent, the records are silent on how the loan in a tune of Tshs. 2,230,000/= was transacted from the respondent to the appellant and the issue of consideration was not raised. He claimed that the proper procedure in advancing a loan was not adhered to.

As to the 3rd ground, the learned counsel for the appellant avers that the trial Magistrate skipped important facts. To support his submission he referred this court to page 5 of the District Court Judgment, the Magistrate stated that the court is the court of rules and justice. In his view, the said rules were not followed. He further argued that the trial Magistrate did not consider and analyse the evidence on record since the evidence did not reveal the type or make of the phone which the respondent used to communicate with the appellant.

On the strength of the above argumentation, Mr. Linus beckoned upon this court to allow the appeal, quash and set aside trial court and the first appellate court proceedings and Judgments.

After careful perusal of the record of the case, the submission of the learned counsel for the appellant, I now turn to confront the grounds of

appeal in the determination of the appeal before me. Mr. Linus tackled each grounds of appeal separately. In my determination, I will consolidate the first and second grounds because they are intertwined. The third ground will be argued separately.

I am fully aware that this is a second appeal. I am therefore supposed to deal with questions of law only. It is a settled principle that the second appellate court can only interfere where there was a misapprehension of the substance or quality of the evidence. This has been the position of the law in this country, see **Salum Mhando v Republic** [1993] TLR 170. See also the decision of the Court of Appeal of Tanzania in **Nurdin Mohamed @ Mkula v Republic**, Criminal Appeal No. 112 of 2013, Court of Appeal of Tanzania at Iringa (unreported). However, this approach rests on the premise that findings of facts are based on a correct appreciation of the evidence. In the case of **Amratlal D.M t/a Zanzibar Silk Stores v A.H. Jariwala t/a Zanzibar Hotel** [1980] TLR 31, it was held that:-

> *"An appellate court should not disturb concurrent findings of fact unless it is clearly shown that there has been a misapprehension of the evidence, miscarriage of justice or a violation of some principle of law or practice."*

Addressing the ground which relates to the admissibility of the electronic evidence and accuracy of information retrieved from the electrical device, Mr. Linus complained that the trial court erred in law in admitting the electronic evidence via text message without considering the accuracy of the said information and proper procedure in tendering electronic evidence.

The admissibility of electronic evidence is articulated under section 64A of the Evidence Act, Cap.6 [R.E 2019] and section 18 of the Electronic Transaction Act No. 13 of 2015. I have perused the trial court and the first appellate court records to illumine the claim by the learned counsel. Records reveal that the trial court entered its verdict based on the respondent's testimony, there was no other supporting evidence. The respondent (original plaintiff) during trial did not tender any exhibit termed as electronic evidence generated from an electronic machine but the oral testimony by the respondent which refers to the contents of the short message service (SMS).

The trial court record reveals that the plaintiff attempted to submit the electronic evidence which was not a printout. In absence of the printout, the trial court proceeded with the hearing of the case, and the respondent based her testimony on a text message which was in her

phone. It is my findings that the trial court Magistrate confidently and with no shade of doubt, referred to the text messages as the basis of the findings. For ease of reference, I reproduce the findings of the trial court as stated on page 3 paragraph 3 as hereunder:-

> *"Nami naungana na maoni ya washauri kuwa mdai ameshinda madai yake kwa kuwa meseji ambazo mdaiwa alimtumia mdai zinadhibitisha kweli alipatiwa shilingi milioni 7,500,000/=..."*

From the above excerpt, it is clear that the respondent did not retrieve the information from her phone. The trial court findings are based on electronic evidence but it remains undisclosed how the same SMS was tendered before the court. In other words, 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. There is no any exhibit that was admitted in court relating to the SMS. Section 64 A of the Law of Evidence Act, Cap. 6 [R.E 2019] state that electronic evidence is admissible evidence in the court of law and section 18 (3) and (4) of the Electronic Transaction Act No. 13 of 2015 has laid a procedural requirement in the admissibility of electronic documents. The admissibility of the evidential weight of data messages

are clearly stated under the Electronic Transaction Act of 2015 specifically section 18 (3) of the Act provides that:-

> *"Section 18 (3) in determining admissibility and evidential weight of a data message, the following shall be considered*
>
> *(a) the reliability of the manner in which the data message was generated, stored or communicated;*
>
> *(b) the reliability of the manner in which the integrity of the data message was maintained;*
>
> *(c) the manner in which its originator was identified and other factor that may be relevant in assessing the weight of evidence.*

Based on the above provision of law, it is crystal clear that the respondent did not follow the required procedure in tendering electronic documents in the court of law. The authenticity of the said SMS are questionable. Apart from SMS evidence, there was no other evidence tendered to support the respondent's claim on the amount of the alleged outstanding debt considering the appellant denied the charges. The respondent is the one who alleged therefore she was required to prove her case. That is in accordance with the elementary principle of he who alleges must prove as embodied in the provisions of section 110 (1) of the Evidence Act Cap. 6 [R.E. 2019] and as stated in the case of **Abdul**

Karim Haji v Raymond Nchimbi Alois and Another, Civil Appeal No. 99 of 2004 (unreported) the Court of Appeal of Tanzania held that:-

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

Applying the above authority of the law, the respondent was duty-bound to prove her allegations.

For the aforesaid findings, I have laboured to show that tendering of electronic evidence in court has its own procedures. However, I want to make it clear that I am aware that the laws governing electronic evidence does not apply at the Primary Court. In this regard, the Primary Court did not only rely on electronic evidence which it admitted unprocedural, but it contravened the Rules of evidence in Primary Courts which do not provide for electronic evidence.

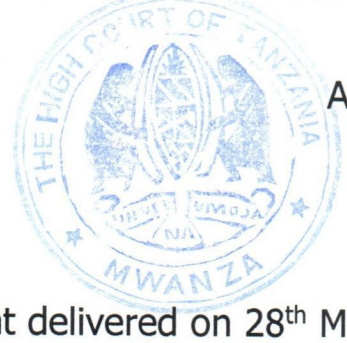
I am in accord with the learned counsel for the appellant that the trial court in the first place erred to determine the case which involved electronic evidence. That above being said, it's my finding that both the first appellate court and the trial court violated the principle of law and practice by wrongly applying electronic evidence.

Since the determination of these two grounds suffice to dispose of the appeal, I find no need to deal with the third ground of appeal, doing so will be a mere academic exercise.

For what I endeavored to discuss above and there was no other evidence tendered to support the respondent's claim on the alleged amount of the outstanding debt I, therefore, find merits in the appeal which is allowed without costs.

Order accordingly.

Dated at Mwanza this date 28th May, 2021.



A.Z.MGEYEKWA

JUDGE

28.05.2021

Judgment delivered on 28th May, 2021 via audio teleconference whereby Mr. Linus Amir, learned counsel for the appellant was remotely present.

A.Z.MGEYEKWA

JUDGE

28.05.2021

Right to appeal fully explained.