

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SONGEA

AT SONGEA

PC. CIVIL APPEAL NO. 03 OF 2021

**(Originating from Civil Appeal number 35 of 2019 at Songea District court
at Songea arising from Civil Case No. 282/2019 at Songea Urban Primary
Court at Songea)**

LAULA EDMUND..... APPEALANT

Versus

BARKE AHMED SAID..... RESPONDENT

JUDGMENT

Date of Last Order: 03/06/2021.

Date of Judgment: 24/06/2021.

BEFORE: S.C. MOSHI, J.:

This is a second appeal. The first appeal was heard by the District Court of Songea. The case originates from Songea urban primary court civil case number 35 of 2019. The appellant successfully sued the respondent in the primary court for a sum of T.shs. 6,694,500/= being part of her share from a business which they did together. Aggrieved by the decision of the Primary court he appealed to the District court.

The District court which is the first appellate court allowed the appeal, it quashed the proceedings of the trial court and set aside the trial court's judgment. Aggrieved by the decision, the appellant has appealed

to this court on the following grounds: -

- 1. That, the first appellate court erred in law and fact to quash the decision of the trial court for the reason that the Appellant did not produce any documentary evidence to justify the claim without considering that the evidence shows and even the respondent testified to receive the payments all alone and that she did not remit the appellant's share for the reasons which were rejected by the trial court, and/or this being the civil matter there is no strictly proof rather the balance of probability.*
- 2. That the first appellate court erred in law to rule that SM3 did not address the court to whom the final cheque was issued while the proceedings clearly shows that when questioned for clarifications by the court SM3 testified to make final payment of T.shs. 1.7 million to the respondent, the amount to be shared equally.*
- 3. That, the first respondent erred in law to rule that the trial court did not properly evaluate and assess the evidence in regards to genuine of agreement without considering that there is no*

dispute on the genuine of agreement between the parties rather the amount to be shared, and or the same was not among the grounds of appeal hence parties were not afforded the right to be heard on the same.

4. That, the first Appellate court erred in law by setting aside the decision of the trial court without considering that the respondent did conceded that she did not remitted the appellant's share at all.

5. That the first appellate court erred in law to quash the whole proceedings, decision and order of the trial court contrary to the law.

The appellant was represented by Mr. Raphael Matola, advocate whereas the respondent appeared in person. The appeal was disposed of by way of written submissions.

Mr. Raphael Matola submitted among other things that, the appellate court misdirected itself to require documentary evidence without considering that not every dispute requires proof from documentary evidence. He said that, unlike disputes arising out of conveyancing of land, this being a civil matter arising from normal business arrangement there is no strict need of documentary evidence to prove and or justify a claim. He said that, the trial court erred when it required proof of a cheque received from SM3, the Director of Taifa Foundation as proof of claim without considering that there is no dispute that the respondent testified that she received the final payment through a cheque, and she conceded that she did not remit appellant's share. The respondent's reasons for not remitting the appellant's share were rightly rejected by the trial court, on

top of that, this being a civil matter the standard of proof is on balance of probability as per regulation 6 of the Magistrates' courts (Rules of Evidence in Primary Courts) Regulations, G.N Nos 22 of 1964 and 66 of 1972. That the appellant discharged her duty before the trial court and proved that the respondent did not remit appellant's share, this assertion was admitted by the respondent in her testimony, hence there was no strict need of the said documentary evidence to prove the claim.

On the second ground he said that, the trial court's proceedings show that when SM3 was questioned by the trial magistrates for clarification SM3 said he made final payment of T.sh. 17 million to the respondent, as payment for the business which the parties did jointly, this testimony was supported by the respondent herself during her testimony and clarifications.

On the third ground, he argued that the entire trial court's records and parties' evidence do not raise a dispute as to the genuineness of the agreement between the parties. They both testified that they worked jointly the fact which was supported by SM3 the director of Taifa Foundation where the parties provided their services. The dispute before the trial court was failure of the respondent to remit the appellant's share of the payment. The issue of genuineness of the agreement was neither discussed in trial court nor being among the grounds of appeal. Therefore,

if the appellate court found that there was the issue of geniuses of the agreement between the parties should have invited the parties to address on the said issue so as to be afforded a right to be heard.

In regard to the fourth ground, he said that, the basis of claim and evidence of the appellant was on the act of the respondent not to remit the appellant's share of payment after being issued with the cheque. This cast a duty to the appellant to prove that the payment was done and that it is true that the respondent did not give the appellant her share of payment. The appellant discharged this duty through her testimony and she was supported by SM3. Even the respondent testified that she received the payment and that she did not give the appellant her share just because she had other allegations against the appellant which was discussed by the trial court and rejected, hence the first appellate court erred to disturb the trial court's findings without directing its mind on actual basis of the claim, and it did not properly evaluate the evidence adduced in the trial court.

In respect of fifth ground, he submitted that, had the first appellate court directed itself on the basis of the dispute between the parties before the trial court and standard of proof on civil matters as stated above it could have satisfied itself that the evidence adduced by the appellant passed the test of standard of proof required in civil disputes.

In reply, the respondent submitted that the first appellate court was correct as it exercised properly its duty to review the record of evidence of the Trial court to satisfy itself as to whether the conclusion reached was proper. The first appellate court analyzed the records of evidence of the trial court and found a grave omission on the side of appellant for failure to issue documentary evidence to prove her claims against the respondent which as per nature of her claims was inevitable. Furthermore, the appellant refused to take her entitled share of the payment and the respondent did not dispute that she did not remit the appellant's share. Also, the appellant failed to support his argument that not every dispute requires proof of documentary evidence, she didn't cite any legal authorities, whether statutory or case law.

On the second ground of appeal, she said that, the observation by the first appellate court that SM3 did not address the court whether the final cheque was in the name of appellant or respondent has merit as there was no documentary evidence was tendered to that effect.

The reply to the third ground was that, the first appellate court did properly rule that the trial court did not evaluate the evidence properly in regard to the genuineness of the agreement because the main dispute is the amount of share out of the payment made in the event that the parties did not equally contribute to the work done. The agreement between the

appellant and respondent in their tender was for each to contribute equally (50% each) so that they could divide the payment equally. However, the parties did not contribute equally, which is a basis of the dispute. The appellant did not contribute equally as far as money and manual labour is concerned, hence is not entitled to equal payment with respondent, the respondent paid the appellant but the appellant refused to receive the share she was entitled to.

On fourth ground of appeal, he said that the respondent did not concede that she did not remit the appellant's share, what she testified is that the appellant refused to receive her payment which she was entitled to.

In rejoinder the appellant's advocate stated that, the issue that the appellant contributed less and demanded equal payment was neither the ground of appeal nor submitted in any how by the respondent in first appellate court hence it cannot be raised at this juncture as it is a new fact and an afterthought, hence it should not be given weight.

Having gone through the evidence on record, the petition of appeal, reply to petition of appeal and submission by the parties, the issue for determination is whether the appellant's claim was proved on the balance of probabilities.

Regulation 1(2) of the Magistrates' Courts (Rule of Evidence in Primary

Courts) provides that: -

1. What the complainant or claimant must prove

(2) where a person makes a claim against another in a civil case, the claimant must prove all the facts necessary to establish the claim unless the other party (that is the defendant) admits the claim.

Regulation 6(2) of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations provides the standard of proof is on the balance of probabilities. The regulation reads thus: -

"In civil cases, the court is not required to be satisfied beyond reasonable doubt that a party is correct before it decides the case in its favour, but it shall be sufficient if the weight of the evidence of the one party is greater than the weight of the evidence of the other".

In the case at hand the trial court held that, the claim was proved on the required standard of law, the decision which was reversed by the first appellate court. The appellant claimed T.shs. 6,694,000/= being her share in the business which they did jointly with the respondent. Therefore, as per the above regulation 1 (2) she was supposed to prove how she came up with the above sum. I will deliberate on 1st, 2nd and 3rd grounds together as they involve District appellant court disregarding oral evidence. Regulation 8 of the Magistrates' courts (Rules of Evidence in Primary courts) (supra) provides for different types of evidence, that facts

may be proved by evidence which may be oral evidence or documentary evidence. Therefore, both oral and documentary evidence are admissible in court. In the case at hand, both parties adduced oral evidence. None of the parties disputed that they had an agreement to do business together, that they did various tasks, and the monies were duly paid to the respondent.

Looking at the evidence which was adduced by both parties, it is evident respondent's evidence was heavier compared to that of the appellant. For easy of reference their evidence is quoted hereunder, starting with that of the appellant: -

"Mimi na mdaiwa tumefanya kazi ya kupikia shule mwaka huu tangu mwezi wa 4/2019 ambao kabla ya likizo Mkurugenzi alituita na kutuambia anasitisha huduma yetu kwani shule haipaswi kujipikia yenyewe, hivyo tulimaliza mkataba wetu na kuanza kusubili malipo yetu ambapo nilikuwa nadai T.shs. 6,694,500/= ambayo ilikuwa ndio mgao wangu wa kazi. Shule ilifungwa na ikawa bado haijalipwa, baada ya muda malipo yalitoka kwa awamu mbili ambapo mdaiwa alichukua awamu zote mbili na nilipata taarifa na kumtafuta na alikiri ni kweli malipo yametoka ila nipo nyasa subiri nirudi, nilisubiri lakini hali ilikuwa ni ile ile kila siku anasema sababu tofauti ndipo siku moja aliniita nikachukue fedha zangu alienda mdogo wangu akapewa Tsh. 1,800,000/= na alinipigia simu na mimi nilimwambia kama ni kiasi hicho usipokee na aicha..."

The respondent on her part testified that: -

" hundi ya kwanza ilikuwa milioni kumi na ya pili ni hundi ya shilingi 17,404,721/= nikatoa pesa yangu ya 2018 ambayoni T.shs. 3,421,005/= ambapo inabakia T.shs. 14,026,020/= na kutoa pesa ya deni la nyuma ni T.shs. 3,765,040/= na kupewa pesa hiyo ilikuwa T.shs. 1,882,520/= ambayo nilimuita alikataa na kubaki T.shs. 10,237,580/= na kutoa pesa ya wiki moja nilitoa T.shs. 885,000/= ikabakia T.shs. 2,942,000/= ndio nikachukua pesa hi na kugawa na kupata pesa yake iliyopo kwangu T.shs. 3,352,520/= hiyo ndio pesa iliyopo kwangu lakini siwezi kumpa mpaka nae atoe hela ambayo alipokea ya Ruhuwiko..."

In fact the respondent elaborated how the payments were made. She indicated the amount that she received from SM3 the deductions she made and the actual amount the appellant is claiming. The appellant did not challenge this piece of evidence during cross examination. It is trite law that failure to cross examine a witness on important matter ordinarily implies the acceptance of the truth of the witness's evidence. See the case of **Hatari Masharubu @ Babu Ayubu vs. R, Criminal Appeal No. 590 of 2017**, Court of Appeal sitting at Mwanza (Unreported), where it was held thus: -

"It must be made clear that failure to cross examine a witness on a very crucial matters entitles the court to draw an inference

that the opposite party agrees to what is said by that witness in relation to the relevant fact in issue."

On the other hand, the appellant made no efforts to explain how she came up with a sum of T.shs. 6,694,500/=.

On the fourth ground; it is true that the respondent admitted that he did not remit appellant's share. The respondent's testimony showed that she still has some money payable to the appellant, which is due after deductions and that the amount will be payable after the appellant has made some remittance.

Generally, it is common ground that the proceeds of the business in terms of money was received by the respondent and it was to be shared by both of them. However, none of them has explained the terms of their oral agreement; as from the evidence their business involved a number of activities. Therefore, in order to prove her shares the appellant needed to offer more evidence; in terms of each parties' contribution in doing work and how the proceeds were to be shared.

That said, this appeal lacks merits consequently it is hereby dismissed in its entirety with costs.

Right of Appeal Explained.




S.C. MOSHI

JUDGE

24/06/2021