IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MBEYA DISTRICT REGISTRY)

AT MBEYA

PC. CIVIL APPEAL NO. 13 OF 2021

(From the District Court of Mbarali District at Rujewa, Civil Appeal No. 04 of 2021, originating from the Primary Court of Rujewa, Mbarali District at Rujewa, Civil Case No. 02 of 2021)

TEGEMEO S/O MADINDO..... APPELLANT

VERSUS

ZAKARIA S/O CHAULA.....RESPONDENT

JUDGEMENT

Date of Last order: 30.09.2021

Date of Judgement: 12.11.2021

Ebrahim, J.:

Having lost at all two courts below, the appellant has preferred the instant appeal raising seven grounds of appeal which in essence can be lumped into five grounds. The appellant is complaining that there was no proof for the payment of Tshs. 4,564,000/-; that the loss occurred had to be shared; the respondent evidence was contradictory. He is also complaining that the appellant's evidence was not considered; there were no reasons for the judgement; and that the appellant did not admit to sell all the onions.

The brief facts of the case as gathered from the proceedings are that the appellant and the respondent agreed to do onions business together. The appellant was entrusted with one hundred and three sacks of onions to take them to Masasi where the market was. The respondent went to Masasi. However, as complained by the respondent, the appellant never gave him any feedback and refused to go back to Masasi to collect the money. The appellant also was not picking respondent's call after coming back from Masasi.

The trial court after hearing the evidence from both parties was of the position that the appellant should pay the respondent Tshs. 4,564,500/- as the amount of money he injected into the business.

Aggrieved, the appellant unsuccessful appealed to the District Court of Mbarali, hence the instant appeal.

This appeal was argued by way of written submission. Both parties appeared in person, unrepresented.

On his submission, the appellant argued that parties agreed to cultivate onions as admitted by the respondent in his testimony at page 3 of the typed proceedings. He contended that the respondent failed to prove that he is entitled to Tshs. 4,564,000/- and the piece of paper he tendered was written on his own whim without authorization of the appellant. He contended also that the respondent agreed to have contributed Tshs. 2,314,500/- which he said was not his money. Since they were four, he argued, the said amount of Tshs. 2,314,500/- was contributed by other three people. Thus, it was wrong for the court to include the whole amount as if it had not been contributed by other people. He cited the provisions of **section 110(1) and 111 of the Law of Evidence Act, Cap 6 RE 2019** on the position of the law that *he who alleges must prove; and that a burden of proof lies on a person who would fail if no evidence at all were given on the other side.*

The appellant contended further that the respondent was aware of each and every step and he even knew that 20 sacks were sold on credit the fact that he did not cross examine. He said also that the respondent did not challenge the fact that both of them went back to Mtwara and saw the remaining sacks of onions. He

referred to the case of **Medson Manga Vs. The Republic**, Criminal Appeal No. 259 of 2019 on failure to cross examine a witness on important matter implies acceptance of the truth of witness evidence. The appellant further talked about non joinder of parties. He commented on the testimony of PW2 as being contradictory and that his evidence on how he was involved in cultivating onions and selling the same at Mtwara was not considered. He also said that the appellate magistrate court did not give reasons for his decision. He relied on the case of **Hemed Said Vs. Mohamed Mbuli** [1983] TLR 113 in arguing that a person whose evidence is heavier must win. He prayed for the appeal to be allowed.

Responding to the submission by the appellant, the respondent argued that the appellant did not object the admissibility of the said piece of paper and the same was not raised at the first appellate court. To buttress his argument, he cited the case of **Makubi Dogani Vs Ngodongo Maganga**, Civil Appeal No. 78 of 2019 – CAT where it was held that the contents of exhibit which was admitted without objection were effectually proved on account of absence of any objection. Hence challenging it appeal is an afterthought. He said the evidence proves that he was the one who contributed Tshs.

2,314,500/-. He further cited the case of **Manager, NBC Tarime Vs Enock M. Chacha** (1993) TLR 228 on the requirement of proof on the balance of probabilities. He contended further that the appellant communicated with the respondent in the beginning but stopped to communicate later.

Responding further, he contended that it is not proper for the loss to be shared between them because the appellant contributed nothing in the business. He distinguished the principle of the cited case **of Medson Manga (supra)** as being irrelevant to the matter at issue.

He commented on the issue of none joinder that the same did not arise at the trial or even at the first appeal. Hence cannot be raised at the stage of second appeal. Commenting on the contradiction, the respondent stated that the evidence of PW2 corroborated his evidence.

Lastly he contended that it is not true that the first appellate court did not give reason and that it raised extraneous matter but rather it referred to the statement of the appellant and based its

decision on the evidence on record. He prayed for the appeal to be dismissed with costs.

In rejoinder, the appellant reiterated what he submitted in chief.

Having gone through the rival submissions, it is obvious that the bone of contention is whether it was justifiable for the appellate court to uphold the decision of the trial court ordering the appellant to pay the respondent Tshs. 4,564,000/-. I am also mindful of the fact that this being the second appeal, the second appellate court is discouraged to disturb the concurrent findings of facts of the lower courts unless there has been misapprehension of evidence, miscarriage of justice or violation of some principles of law or practice. The said principle has been enunciated in the cases of **Issa Mgara@ Shuka V Republic**, Criminal Appeal No.37 of 2005 (Unreported); and **Dickson Joseph Luyana and Another V Republic**, Criminal Appeal No.1 of 2005 (Unreported), to mention but a few.

Indeed, the determination of this case depends on the weight of evidence adduced at the trial court in tandem with the principle of the law that *whoever wishes the court to believe on the existence of a fact has a duty to prove the existence of such fact* – **section 112**

of the Law of Evidence Act, Cap 6 RE 2019. I shall therefore determine all the grounds of appeal generally.

At the trial court, the respondent herein adduced evidence **(SM1)** that they were four people whom they agreed to do farming of onions together. He said the appellant borrowed from him Tshs. 500,000/- and when the produce (onions) were ready he advanced Tshs. 2,314,500/- so that the onions could be taken to Masasi on 08/2020. He testified further that when the appellant got to Masasi, he told him that the price has dropped to Tshs. 60,000/-. Then after, the appellant stopped all the communications and there was different information from the middleman who also stopped to communicate as well. He said the total amount that he is owed by the appellant Tshs. 4,565,000/-. He tendered a note book which he said he used to record all the money he disbursed for the farm and the same was admitted **for identification only**. Responding to cross examination question, the respondent said that the appellant returned from Masasi without informing him. The respondent called a witness one **Shukran Khatibu Kilemile, SM2**. He testified that the appellant was the supervisor of the farm which was the respondent's property and it was the respondent who was giving them money. He testified that

the appellant owed the respondent money but he did not say how much. Responding to cross examination questions he said that the appellant received Tshs. 200,000/- and Tshs. 500,000/-.

Defending his position, the appellant testified as **SU1**. He said on 20.07.2020 he advised the respondent that they should go to Masasi to sell their produce (onions) of which by then the price was Tshs. 120,000/-. They has 103 sacks. The appellant went to Masasi where he was told by the middleman that the price has dropped and he agreed for the onions to be sold. However, for four days they could not sell anything thus he decided to sell 20 sacks on credit. After that he fell sick and on 16.08.2020 he decided to go back home. Few days later he was arrested and taken to Masasi and later sent to court. Responding to cross examination question, he said that he called the respondent and that the respondent neither sold anything nor advanced any money.

The appellant called a witness, **Steven Nicolaus Kikwembe (SU2)**. He said the appellant called him on 20.07.2020 and he informed him the price at Masasi is Tshs. 120,000/- and asked him to bring the onions. He said the appellant brought the products and they started selling them on 29.07.2020 where the price dropped to Tshs. 60,000/-. They both agreed to sell at that price. 40 sacks were

sold and the respondent refused to put it in writing. Responding to cross examination questions, he said he witnessed the onions and he worked with the middleman in researching for the price.

In reaching the decision, the trial court formed the opinion that the respondent used Tshs. 4,564,500/- and that the appellant stopped making follow up to the middleman.

I must state on the outset here that the trial magistrate has assumed facts which were not on the record. I have dispassionately gone through the proceedings on record and neither the appellant nor the respondent or SM2 and SU2 adduced any evidence that revealed that the appellant refused to make follow up to the middleman. If at all, when the appellant was responding to cross examination question he said that he handed over 103 sacks to the middleman and they have not yet been paid. The trend has been censured by the Court of Appeal in the case of **Filbert Alphonce Machalo Vs The Republic**, Criminal Appeal No. 528/2016 after the appellate judge had imported her own opinion instead of basing on the evidence before her. The Court of Appeal held as follows:

"With due respect to the learned first appellate Judge, we think it was a misdirection to dismiss the ground of appeal by the

appellant, by invoking her own imported opinion instead of basing on the evidence which was before her"

I subscribe to the above illustrated principle and find that the trial court had no any evidence before him to conclude that the appellant refused to make follow up of the payment. The information before the court was that there was business arrangement between the parties and the appellant was availed 103 sacks of onions to go and sell them at Masasi.

The trial court again stated that the respondent was justified to be paid Tshs. 4,564,500/- that he used as expenses. Nevertheless, the respondent stated in his own testimony that the appellant owed him Tshs. 500,000/- and later he advanced Tshs. 2,314,500/-. Surprisingly, the respondent said he used Tshs. 4,565,000/- and tendered in court a note book which was only admitted for identification purposes and not as an exhibit. With respect to the counsel for the respondent who relied in the case of **Makubi Dogani Vs Ngodongo Maganga** (supra) that the exhibit was uncontested, the case is distinguishable with the circumstances of this case as the said document was not admitted as an exhibit hence it had no any probative value. It was merely admitted for identification. Therefore, it cannot be used to form basis of decision. Furthermore, I have gone through the said note book,

apart from recording various transactions, there is only one transaction that is written that on 09.04.2020 "Madindo alichukua hela ya dawa =50,000/-". Otherwise, all other transactions are incorrigible and are not substantiated by the signature or any affirmation by the appellant that indeed he took the said amount. If at all, I would say that the appellant did not deny to have received Tshs. 500,000/- and Tshs. 2,314,500/- as he did not cross examine SM1 on the fact. It is the position of the law that failure to cross examine a witness on a particular important point may lead the court to infers admission of such fact and it will be difficult to suggest that the evidence should be rejected. This principle was held by the Court of Appeal in the case of **Shadrack Balinago vs. Fikiri Mohamed @ Hamza, Tanzania National Roads Agency (TANROADS) and Attorney General**, Civil Appeal No. 223 of 2017 (unreported) where it was stated that:

"As rightly observed by the learned trial judge in her judgment, the appellant did not cross-examine the first respondent on the above piece of evidence. We would, therefore, agree with the learned judge's inference that the appellant's failure to cross-examine the first respondent amounted to acceptance of the truthfulness of the appellant's account".

I associate myself with the above principle of the Court of Appeal. In essence therefore, I agree with the appellant's 1st and 4th grounds of appeal that there was no proof that the respondent spent Tshs. 4,564,000/- without concrete proof. As it stands, the said amount requires strict proof thereof.

The above not – withstanding and as intimated earlier, the appellant did not deny specifically that the respondent did not advance him Tshs. 500,000/- and that he spent Tshs. 2,314,500/-.

It is on those circumstances I find that the two lower court misapprehended the evidence on record and I accordingly order the appellant to pay the respondent Tshs. 500,000/- and Tshs. 2,314,500/- only. Appeal is therefore allowed to the above extent only with costs.

Accordingly ordered.

THE HIGH COURT OF TANZANIA

R.A. Ebrahim
Judge

Mbeya
16.11.2021