IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DODOMA DISTRICT REGISTRY)
AT DODOMA

PC CIVIL APPEAL NO. 21 OF 2021
(Originating from Civil Appeal No. 15/2021 Dodoma District Court & Arising from Civil No. 259/2020 Dodoma Urban Primary Court)

BONIFACE DOTTO .....APPELLANT

VERSUS

BAHATI MANYANDA.....RESPONDENT

JUDGMENT

29/03/2022 & 06/05/2022

KAGOMBA, J

BONIPHACE DOTTO, the appellant herein, challenges a concurrent finding of both the Dodoma Urban Primary Court in Civil Case No. 259/2020 and the District Court of Dodoma in Civil Appeal No. 15 of 2021 that he owes BAHATI MANYANDA, the respondent herein, a sum of Shillings Four Million Two Hundred Thousand only (TZS 4,200,000) being an outstanding debt from a loan of Shillings Five Million (TZS 5,000,000) which he borrowed from the said respondent.

A brief back ground of this matter shows that on 18/12/2018 the appellant, accompanied by his wife, approached the respondent and asked him to lend them Shillings Two Million only (TZS 2,000,000/=) for purpose

of construction work which the appellant had been contracted to carry out at Msalato in Dodoma. Being his acquaintance; the respondent gave him the money and an agreement to witness that loan was signed between the parties.

After few days, on 9/01/2019 the appellant approached the respondent for yet another loan of Shillings Three Million only (TZS 3,000,000/=), promising to use the money to finish up his project with anticipation of being paid his contractual dues which he would use to pay the respondent his entire loan of shillings five million only (TZS 5,000,000/=). The respondent again obliged. Again, an agreement to witness the additional loan was signed by the parties. After all this the appellant did not pay his debt as promised. The respondent used different means to get his money paid and eventually he was paid Eight Hundred Thousand Shillings only (TZS 8,000,000/=) via telephone money transfer. He then had to sue the appellant at Dodoma Urban Primary Court, which after a trial backed by the signed loan agreements, and in which the appellant avoided to give his defence for about five times he was required so to do, entered judgment in favour of the respondent for the outstanding amount of Shillings Four Million Two Hundred Thousand only (TZS 4,200,000/=).

The District Court of Dodoma, on appeal preferred by the appellant, was "satisfied that the respondent's claim before the trial Court was well founded". It was the District Court's finding that the appellant entered into a contract with free, willing and uncorrupted mind which for reasons known to himself he did not perform his obligation and therefore has to make good his promise by paying the contractual sum.

The appellant being aggrieved by the decision of the District Court (1st appellate Court) has appealed to this Court. He prays the Court to allow his appeal, thereafter to quash the whole decision of the trial Court and the 1st appellate Court. His appeal is based on the following three grounds:

1. The trial Court and the first appellate Court erred in law and fact by acting on the evidence given by the respondent while it was not proved to the balance of probabilities.
2. The trial Court and the first appellate Court erred in law and fact by deciding the case in favour of the respondent without considering that the appellant was denied the right to be heard as some of the appellant's evidence was rejected in absence of good cause.

3. The trial Court and the first appellate Court erred in law and fact by deciding the case in favour of the respondent without first considering the circumstances prevailing in this case.

During hearing of the case, both parties appeared in Court and argued their respective case without legal representation.

The appellant in arguing on his first ground of appeal, submitted that the evidence by respondent during trial did not prove in details the amount of debt to enable the trial Court grant his prayers as it did. It was the appellant's contention that the evidence of the respondent according to the trial Court proceedings and judgment was contradictory by stating in some places that the respondent has been fully paid, while in some other places he stated that he was claiming for interest or damages. The appellant further contended that even the respondent's witness confessed that the respondent has been paid his money. For these reasons, it was the appellant's view that the testimony adduced in favour of the respondent was hanging and thus did not meet the standard of proof.

On the second ground of appeal where the appellant claimed to be denied his right to be heard, he submitted that the District Court did not consider his complaint that the trial Court did not give him a right to be heard as well as his witness. The appellant asserted that if his evidence would have been heard, the trial Court would have found that he had paid the respondent some of the debt via M-pesa. He asserted that he had a right to be heard no matter whether he was right or wrong.

On the third ground of appeal, the appellant submitted that the prevailing circumstances of the case were not considered by the Courts, particularly the first appellate Court. He elaborated the said prevailing circumstances as follows;-

One, while in trial, he made prayers for leave of absence due to sickness, the prayer was turned down by the trial Court.

Two, the presiding trial magistrate was hiding from the appellant the dates of the case. He elaborated further that when he was going to the Court, he was being told that the hearing was not scheduled on that date

but the respondent was being called in the Magistrate's office and was discussing about the case with the Court assessors.

Three, upon following up on the date of the case with the Court clerks, the appellant found that he was marked absent while the respondent was marked present.

Four, the Court file was no longer handled by Court clerks but the trial Magistrate himself. The Magistrate set a date of judgment and claimed that the appellant had refused to be heard.

Five, on the date both parties appeared in Court, the judgment was adjourned but when the appellant went to Court next time, he was told that the judgment has already been delivered.

Six, when the appellant sought for copies of the judgment the file was misplaced. He wrote letters to several places to complain whereupon the trial Magistrates released the file. He said it is for all these reasons he is unhappy with the decisions of the lower Courts and now seek to overturn them.

The above submission by the appellant faced a fierce opposition from the respondent. On the first ground of appeal in which the appellant alleges that the case was not proved to the required standard of proof, the respondent submitted that the decision of the trial Court was fully backed by evidence tendered in Court by him and his witnesses. He said, the evidence tendered during trial included electronic transactions between the parties with regard to the debt. The respondent further submitted that while he adduced evidence to prove his case to the required standards, the appellant did not produce any evidence despite being given chance to do so by the Court.

On the second ground of appeal where the appellant alleged to have been denied his right to be heard, the respondent vehemently opposed the claim. The respondent submitted that the appellant was asked if he was ready to adduce his defence but he said he was not ready because he was travelling. The respondent further submitted that after more than four adjournments due to absence of the appellant, the Court had to proceed without hearing his evidence.

The respondent further responded that when the appellant attended the Court after his long absence, he rejected the first trial Magistrate Hon. Msangi whereby the matter was transferred to Hon. Mhelela. That, despite of the change of presiding Magistrate, the appellant did not bring witnesses to defend his case. It was the respondent's further contention that the appellant was given the right to be heard as he even cross examined respondent's witnesses during trial.

The respondent went on to inform the Court that for about one year the appellant failed to bring his witnesses whereupon the Court closed the evidence and set a date for delivery of judgment.

It was the respondent's further submission that the appellant was in trial Court's compound when the judgment was being delivered but he opted not to enter in the Courtroom. The appellant further submitted that after the judgment was delivered both the appellant and the respondent went to the trial Magistrate's office where each was given a copy of the judgment and left the Court premises. The respondent supports the decision of the District Court on appeal which he said, it was based on proper appreciation of the evidence adduced during trial.

On the third ground of appeal, the respondent vehemently opposed all the allegations raised by the appellant against him and Court officials. He dismissed them as unfounded. He leaned himself on the evidence he had adduced during trial as the basis for the decision made by both lower Courts.

In his rejoinder, the appellant conceded to the fact that he did not produce any evidence during trial. He said, that happened because the Court did not give an order to Vodacom to produce print out of the payment which he had effected to the respondent vide M-pesa. He asserted that the trial Court was supposed to consider that the evidence from Vodacom was the basic evidence for his defence.

The appellant also rejected as untrue the respondent's assertion that the appellant refused to adduce evidence because he was travelling. He also denied the respondent's submission that the appellant was within the Court compound when the judgment was being delivered by the trial court. This is what both parties submitted to this Court in respect of this appeal.

Having heard the above submissions by the parties, I consider the following to be main issues for the determination of this appeal.

1. Whether the appellant was denied his right to be heard during trial.
2. Whether the decisions of the lower Courts were properly made against the appellant.

As the denial of a right to be heard is such a fundamental one that once proved it automatically vitiates the decision reached, this Court has scrutinized the records of the lower Court to find out if there was such a denial as alleged by the appellant. Records show that the respondent filed his case at the trial Court since 1st December, 2020. The appellant and the respondent appeared in Court before the first trial Magistrate on 14/12/2020 when it was ordered that the respondent should produce his witness in Court on 21/12/2020 for hearing of the plaintiff's case. On the said set date of hearing (i.e 21/12/2020) the appellant was absent. The appellant was however present on 18/01/2021 when hearing of the plaintiff's case eventually took off. It is on that date when the appellant asked the 1st trial Magistrate to recuse himself for lack of confidence in him. The record shows that the reason for the appellant losing confidence in the trial Magistrate is that the Magistrate refused to give him a copy of the loan agreement.

When the matter was transferred to the other trial Magistrate Hon. F. S. Mhelela, the appellant appeared and hearing of the case proceeded in his presence. Proceedings show that the appellant was shown the exhibits and had no objection to their admission in evidence. On 21/1/2021 when the plaintiff's case was closed, the appellant who was defendant told the Court that he shall bring five (5) witnesses whereupon the matter was set on 5/2/2021 for defence hearing. On this set date, the appellant asked for adjournment for a reason that he was sick. The Court accepted and adjourned the hearing of defence case to 16/2/2021. The Court ordered the appellant to bring his witnesses on that scheduled date. On the set 16th February, 2021 the appellant appeared in Court without witnesses and asked for a short adjournment because he was travelling abroad. The Court adjourned the hearing to 18th February, 2021 where the appellant defaulted appearance.

On 11/03/2021 the appellant appeared in Court and told the Court that he has not been able to adduce his evidence because he asked for Court order to be issued to enable him get print outs of payment transactions which he made via phone to the respondent but he had not been given what he

wanted. Court records show further that the appellant told the Court that he will not adduce his evidence and called upon the Court to proceed with pronouncing the judgment. Such is the record with regard to the allegation by the appellant that he was denied a right to be heard. The Court proceeded to set the 6th day April, 2021 as a date of judgment.

Having perused the trial Court record thoroughly, I have not been able to see any request for order to be issued to the telephone operator to demand production of print outs of the payments, purportedly made by the appellant. In the circumstances, I think the trial Court was right to proceed with pronouncing its judgment the way it did. It is obvious that the appellant was fully availed with his right to be heard but chose to dodge it. For this reason, the first issue is answered in the negative.

On the second issue as to whether the decisions of the lower Courts were properly made against the appellant, this Court has to rely on the available records. According to the proceedings and the judgment of the trial Court, the respondent did adduce evidence to prove that he had lent the appellant a total of Tsh. 5,000,000/=. There is no dispute that the appellant was given the said amount of money as a loan, on friendly basis, by the respondent.

What was being disputed by the appellant during trial is the amount of outstanding debt which the appellant had said it was TZS 4,200,000/=.

As I have explained earlier when determining the first issue, the appellant was given all the time in the world to defend himself. Despite pleading to the trial Court that he would call five witnesses to defend his case, he failed to do so for no good reason. Under such circumstances the trial Court correctly applied the available evidence to decide that the outstanding debt payable to the respondent is TSh. 4,200,000/=. Likewise, the 1st appellate Court rightly upheld the findings of the trial Court and ordered accordingly.

The judgment of the 1st appellate Court properly analyzed the evidence adduced during trial in line with the duty of the Court in first appeal. The 1st appellate Court was also able to elaborate on the standard of proof required for the respondent to prove his case during trial, which eventually led to its decision that the appeal filed by the appellant herein had no merit.

In **Salum Bugu V. Mariam Kibwana, Civil Appeal No. 29 of 1992 Court of Appeal, DSM (unreported)** it was held that an appellate Court, like the District Court in this case, could only interfere with the finding of fact

by a trial Court where the said appellate Court is satisfied that the trial Court had misapprehended the evidence in such a manner that its conclusion are based on incorrect premise. Since there was no such misapprehension of evidence by the trial Court, the District Court on appeal correctly avoided to interfere with the trial court's finding that the appellant is indebted to the respondent to the tune of TZS 4,200,000/=.

There being a concurrent finding by the two lower Courts on the appellant's indebtedness to the respondent, and there being no misdirection or non-directions on the available evidence by the first appellate Court, I restrain myself from interfering with such a concurrent finding. Accordingly, the second issue on the propriety of the decision of the two lowers courts is answered in the affirmative. The Court holds that the proceedings and decision of the trial Court and the first appellate Court were properly done against the appellant despite his allegations that the same were marred with favouritism.

It is trite law that he who alleges must prove. The appellant when submitting on the third ground of appeal listed the circumstances which prevailed during trial which he intended to impress upon this Court that such

circumstances tilted the balance of justice in favour of the respondent. To allege is one thing and to prove is another. There was no proof whatsoever from the appellant. The allegation of favour to the respondent are accordingly disregarded. In light of the evidence adduced in trial Court, no any favour could be imputed on the trial Court officials.

Having determined the two issues raised in this appeal, I find the entire appeal lacking in merits. The appeal is therefore dismissed with costs.

Ordered accordingly.

DATED on this 06th Day of MAY 2022

ABDI S. KAGOMBA

JUDGE