

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 6 OF 2022

ANNA NDEWELE.....APPELLANT

VERSUS

VIOLET KYANDO (WOMEN POWER GROUP) RESPONDENT

***(Appeal from the judgment and decree of the District Court of
Kinondoni in Civil Appeal No.93 of 2021)***

JUDGMENT

13th and 28th June, 2022

KISANYA, J.;

This is a second appeal. The respondent, Violet Kyando Women (Power Group) was the plaintiff in a suit filed in the Primary Court of Kimara at Kinondoni, against the appellant, Anna Ndewelee. She claimed for a debt of Tshs. 1,500,000 alleged to have been advanced to her as a loan. After hearing both sides, the trial court resolved the suit in favour of the respondent. It went on ordering the appellant to pay the respondent a sum of Tshs. 750,000/= and costs of the suit.

Following an appeal lodged by the appellant in the District Court of Kinondoni at Kinondoni (first appellate court), the decretal sum was reduced to Tshs. 150,000/=.

Feeling that justice was not served to her, the appellant appealed to this Court on two grounds of appeal which can be paraphrased as follows:-

1. The first appellate court erred in law and fact in holding that the appellant should pay Tsh. 150,000/= to the respondent.
2. That the first appellate court erred in law and fact by ignoring the appellant's documentary evidence (Exhibit D1).

The hearing of this appeal was by way of written submissions. The appellant enjoyed the legal aid services of Ms. Coletha Galus Milinga, learned counsel from the Legal and Human Rights Centre, while the respondent was represented by Mr. Philemon Mganga, the learned counsel.

Submitting on the first ground of appeal, Ms. Milinga contended that there was no evidence to support Tshs. 150,000 awarded to the respondent by the first appellate court. She elucidated that PW1, PW2, PW3 and PW4 did not tender evidence to prove their respective oral testimonies that Women Power Group of which appellant is a member disbursed or paid her the sum of Tshs. 1,500,000 through mobile money transfer.

Mr. Milinga submitted further that the amount pleaded in the claim lodged before the trial court and the evidence adduced by the respondent are at variance. Her submission was premised on the fact that PW1's evidence was to the effect that the sum advanced is Tshs. 900,000/ and not Tshs. 1,500,000/= as pleaded.

Thus, the learned counsel was of the view that the said contradiction is an indicator that the claim against the appellant was cooked and unfounded.

Ms. Milinga went on faulting the first appellate court for holding that the appellant was supposed to pay the sum of Tshs. 150,000 while a written agreement to prove such fact was not tendered. She also contended that the respondent did not call the chairperson who witnessed the loan agreement (Exhibit P1) relied upon by the respondent.

It was Ms. Milinga's argument that the respondent was under an obligation to prove her claim under section 110 of the Evidence Act. She amplified her argument by citing the case of **Africarriers Limited vs Millenium Logistics Limited**, Civil Appeal No.185 of 2018.

On the second ground of appeal, Ms. Milinga submitted that the trial magistrate ignored the printout of mobile money statement (Exhibit D1) tendered by the appellant. She contended that the said exhibit shows no money transaction from the respondent to her (the appellant). The learned counsel was of the view that the trial court's finding that the appellant might have secured another line is unfounded and that it intended to favour the respondent.

From the foregoing submission, the learned counsel urged this court to allow the appeal, quash and set aside the judgement and decree of the first appellate court.

Mr.Mganga resisted the appeal. With regard to the first ground of appeal, his response was to the effect that the first appellate court considered the evidence adduced on record. Clarifying, he submitted that the evidence shows that the appellant's husband had paid Tshs. 750,000/= out of Tsh.900,000/= which the appellant owed the respondent. Therefore, he was in agreement with first appellate court that the remaining balance which the appellant owed the respondent is Tshs.150,000/.

Mr. Mganga went on to submit that the appellant did not dispute that she is the member of Women Power Group, with objective to provide loans to its members. He also submitted that the same members testified and gave evidence which proved the respondent's case. It was his submission that no witness was called by the appellant to testify in her favour. The learned counsel was of the view that it is the appellant who was required to call her husband. Therefore, referring to the case of **Hemed Said vs Mohamed Mbilu** (1984) TLR 113, Mr. Mganga invited this Court to draw an adverse inference against the appellant.

As regards the second ground of appeal, Mr. Mganga submitted that the Exhibit D1 tendered by the appellant was accorded weight by the trial court in the analysis of its evidence.

Having considered the submission from both parties the issue for determination is whether this appeal is meritorious. It is my considered view that

the grounds in this appeal give rise to one issue, whether the respondent proved her claim against the appellant.

In terms of the record, the trial court and first appellate court were at one that the appellant was indebted to the respondent. However, the two lower courts differed on the amount of loan paid to the appellant. While the trial court was of the view that it was Tshs. 1, 500,000/=, the first appellate court held that loan was Tshs. 900,000/=. Further to this, both lower court considered that the appellant's husband had paid Tshs. 750,000/= on behalf of the appellant.

It is settled law principle that a second appellate court cannot interfere with the concurrent findings of facts by two courts below unless it is clearly shown that there has been a misapprehension of the evidence, miscarriage of justice or violation of some principles of law or practice. See the **Amratilal D.M t/a Zanzibar Hotel** [1980] TLR 31 where the Court of Appeal held that:-

"Where there are concurrent findings of fact by two courts below, the court should as a wise rule of practice follow the long-established rule repeatedly laid down by the court of appeal of east Africa. The rule is that an appellate court in such circumstances should not disturb concurrent findings of facts unless it is clearly shown that there has been a

misapprehension of the evidence, miscarriage of justice or violation of some principles of law or practice".

In the present appeal, I am of the view that the appellant has advanced misapprehension of evidence as a reason for this Court to interfere with the decisions of the two lower courts.

As indicated earlier, both lower court arrived at a concurrent findings that the respondent advanced a loan to the appellant. I was therefore, inclined to examine the trial court's record. Pursuant the respondent's evidence adduced by PW1, PW2, PW3 and PW4, the appellant's received the claimed amount through mobile money transfer in two instalments of Tshs.600,000/= and Tshs.300,000/=. However, as rightly submitted by Ms. Milinga, the respondent and her witnesses did not tender the mobile money transfer printout to substantiate their claims. The sole evidence relied upon by the respondent is the deed of acknowledgement (Exhibit P1) in which the appellant's husband paid the respondent the sum Tsh. 750,000/= and undertook to pay the outstanding balance of Tshs. 750,000/=.

It is my considered view the said deed of acknowledgement was not sufficient evidence to prove the respondent's claim. This is because the appellant's husband who was not a party to the purported debt or loan agreement between the respondent and appellant. Considering further that the respondent did not prove how the money was paid to the appellant, the fact that the appellant's

husband paid the said amount does not imply that the respondent proved her claims against the appellant.

In addition to the above, since the respondent alluded that Women Power Group's objective is to advance loan to its members, one would expect that there is a clear record of member's contributions and existence of formal loan agreement to that effect. This was not done. Much as the respondent was the claimant at the trial court, she was required to prove the existence of the said debt by tendering supporting evidence to that effect. She was duty bound to prove that the weight of probability favours her case than that of the appellant. I am fortified by the case of **Yusufu Selemani Kimaro vs Administrative General & Others**, Civil Appeal No.266 of 2020 in which it was held that:-

"For, in civil cases, the onus of proof does not stand still, rather it keeps on oscillating depending on the evidence led by the parties and a party who wants to win the case is saddled with the duty to ensure that the burden of proof remains within the yard of his adversary".

See also the case of **Berelia Karangirangi vs Asteria Nyarambwa**, Civil Appeal No.237 of 2015 (unreported) in which the Court of Appeal underscored on the gist of burden of proof in civil cases.

From the foregoing, I am of the considered view that the two lower courts misapprehended the evidence adduced before the trial court. And guided by the above stated position, this Court is enjoined to interfere with the concurrent findings of the lower court by holding that the respondent did not prove to have advanced the loan to the appellant. Thus, the appeal is meritorious.

In the event, the appeal is hereby allowed. Accordingly, the judgment and decree of the trial court and first appellate court are quashed and set aside. Given the relationship between the parties to this case, I order each party to bear its own costs.

DATED at DAR ES SALAAM this 28th day of June, 2022



S.E. Kisanya
JUDGE