IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

CIVIL APPEAL NO. 5 OF 2022

(Originating from the decision of the District Court of Kisarawe at Kisarawe, in Civil Appeal No. 4 of 2021, by Hon. Lukosi-RM dated 22nd day of December, 2021)

SHIDA MOHAMED NONDOLE .... APPELLANT

VERSUS

EMANUEL RAPHAEL NKUWI .... RESPONDENT

JUDGMENT

14th June, & 15th July, 2022

ISMAIL, J;

The parties hereto are in-laws to one another. The appellant, a loser in the 1st appellate court was married to the respondent's brother. She had a construction project at Mkuranga, Coast Region. In 2015, she allegedly enlisted the assistance of the respondent in procuring building materials, namely; timber and roofing tiles, all of which were intended to cost TZS. 20,000,000/-. Believing that the respondent would deliver on his

undertaking, the appellant allegedly entrusted him with the responsibility and handed to him the said sum of money.

After a long wait and persistent reminders, it was realized that the said materials had not been procured, despite the respondent's assertion that the same had been acquired and kept at a mason's home. It turned out that the respondent reneged on the promise. Efforts to have the matter resolved at the family level came to naught. It is then, that the appellant instituted Civil Case No. 25 of 2020 in the Primary Court of Kisarawe at Kisarawe. After a hearing that saw the appellant marshal attendance of four witnesses, against two for the respondent, the trial court found for the appellant. It ordered the respondent to pay back the sum to the appellant.

The verdict bemused the respondent. He decided to institute an appeal to the District Court of Kisarawe at Kisarawe and it succeeded. The 1st appellate court reversed the decision of the trial court on the ground that the appellant's case was not proved to a satisfactory level.

This finding rattled the appellant. She felt hard done by it and took the view that the decision was not in conformity with the law. In an appeal to this Court, five grounds have been preferred as reproduced hereunder:

1. *That the trial magistrate erred in law and fact for believing that all contracts/Agreements must be written and proved by writing while it is not a legal requirement.*

2. *That the trial magistrate erred in law and fact for failure to observe that the respondent admitted the debt, but only claimed for the same to be claimed under criminal procedure.*
3. *That the trial Magistrate grossly misdirected himself in fact and law for not observing that rules of procedure were contradicted.*

4. *That the trial Magistrate grossly misdirected himself in law and fact for not observing that the appellant had proved her case on the balance of probabilities as required by the law.*

5. *That the trial Magistrate misdirected himself in law and fact for believing that the evidence of PW3 and PW4 was hearsay evidence which was not the case.*

Pursuant to an order of the Court, dated 14th June, 2022, hearing of the matter was ordered to proceed by way of written submissions in conformity with the schedule agreed upon by the parties.

Submitting on ground one, Mr. Nickson Ludovick, learned counsel for the appellant, relied on three decisions of the Court to contend that contracts may be entered orally and become enforceable by the parties. The decisions are: ***Iscon Commodities (T) Ltd v. Abdul Ahmad Lilah***, HC-Civil Case

No. 08 of 2018 (unreported); ***Buku v. Magori*** [1971] HCD 161; and ***Merali Hirji & Sons Ltd v. General Tyre*** [1983] TLR 175. Mr. Ludovick argued that the oral contract was based on good faith, knowing that the parties are in-laws. It was on that basis that the appellant parted with her TZS. 20,000,000/-, and that she never anticipated that the respondent would renege on her promise.

Regarding ground two of the appeal, the contention by the appellant is that, since the respondent pleaded that he is indebted to the appellant but faulted the recovery process as erroneous means that she admitted to indebtedness. Mr. Ludovick invoked the principle that is to the effect that parties are bound by their own pleadings, where the respondent suggested that a criminal action ought to have been preferred to a civil route taken by the appellant. He bolstered his argument by citing the Court of Appeal's decision in ***Linus Chengula v. Frank Nyika (Administrator of the Estate of the late Asheri Nyika)***, CAT-Civil Appeal No. 131 of 2018, which quoted with approval the decision in ***James Funke Gwagilo v. The Attorney General*** [2004] TLR 161.

With regards to ground three, the appellant's assertion is that the trial magistrate's holding that a contract need be in writing for it to be enforceable was a misconception. He further contended that the testimony adduced by

the appellant was sufficient, it being a civil case in respect of which the standard of proof is on the balance of probabilities.

Submitting on ground four of the appeal, Mr. Ludovick argued that the appellant proved the case by enlisting all witnesses, including her husband, the respondent's sibling. She maintained that the contract was oral, informed by good faith that she had in the respondent. He argued that section 61 of the Evidence Act, Cap. 6 R.E. 2019 permits oral testimony in proof of cases, he maintained that the standard of proof on the balance of probabilities as was held in ***Jasson Samson Rweikiza v. Novatus Rwechungura Nkwama***, CAT-Civil Appeal No. 305 of 2020 (unreported).

With regards to ground five, the argument by the appellant is that the testimony of PW3 and PW4 was not hearsay. She argued that none of the said testimony constituted a third party account. It was direct evidence that was based on what transpired.

In conclusion, the appellant prayed that the appeal be allowed, and that the trial court's decision should be reinstated after dismissal of the decision of the 1st appellate court.

The respondent's submission was preferred by Mr. Omari Kilwanda, learned advocate. Submitting on ground one, the learned advocate, took an

exception to the appellant's submission that the trial magistrate held that oral agreement was no agreement. He argued that the divergence was on the contention that the respondent's responsibility ended with connecting the appellant to the contractor who carried out the finishing of the house.

The respondent argued that the duty was cast upon the appellant to prove that money changed hands from the appellant to the respondent. In this case, the respondent argued, no sufficient evidence was adduced to prove that such payment was effected. Learned counsel maintained that the question of there being an oral contract was not disputed by the 1st appellate court. He maintained that the testimony on existence of a debt was insufficient and the court was justified to quash the decision of the trial court.

With respect to ground two of the appeal, the view held by the respondent is that a mere claim that the case be instituted as a criminal case does not constitute an admission of the claim. He cited section 26 of Cap. 6 which provides that admissions do not amount to conclusive proof of admitted matters, except that they may operate as an estoppel against the party making the admission. In this case, no proof was given by the appellant.

Submitting on grounds three and four, the respondent argued that the law is clear and it is to the effect that, under section 110 (1) and (2) of Cap. 6, the alleger of a certain fact must prove the allegation. The respondent defended the lower court decision that raised doubts on the veracity of the evidence adduced by the appellant on how the sum due reached the respondent. The learned advocate argued that the appellant has failed to demonstrate procedures which were allegedly contravened by the 1st appellate magistrate. The respondent buttressed his position by citing the decisions in ***Africarriers Limited v. Millenium Logistics Limited***, CAT-Civil Appeal No. 185 of 2018 (unreported); and ***Jasson Samson Rweikiza v. Novatus Rwechungura Nkwama*** (supra). In both of the decisions, the upper Bench maintained that the burden of proof lies on the party who alleges or asserts the affirmative of the issue alleged.

Submitting on ground five, the respondent's advocate argued that the testimony of PW3 and PW4 was not an eye witness account of what transpired. This is in view of the fact that both of the said witnesses got what they testified on from the appellant's narration. The respondent argued that, in terms of section 62 (1) of Cap. 6, such testimony is inadmissible. To fortify his contention, learned counsel referred the Court to the decision of superior Court in ***Vumi Liapenda Mushi v. Republic***, CAT-Criminal Appeal No. 327

of 2016 (unreported), in which part of the testimony was obliterated for being a hearsay testimony.

The respondent prayed for dismissal of the appeal and confirmation of the 1st appellate court's decision.

Having gone through the parties' rival submissions and the records of proceedings in lower court, the broad question for determination is whether this appeal is meritorious.

Ground one of the appeal castigates the 1st appellate court's holding that contracts or agreement must be written. She takes the view that that is not a legal requirement. The respondent contends that the finding of the 1st appellate court was that there was no tangible evidence to substantiate the claim.

I fully agree with the respondent's contention that the 1st appellate court's finding did not discredit oral agreements as being of inferior quality. The court was not convinced that evidence existed to prove the appellant's assertion.

While I consider the question of whether contracts need be written not a matter that should be subjected to any finding, I need to reiterate the fact that, in law, oral contracts are as good and effective as written contracts.

This view is premised on the provisions of section 2 (1) (d) of the Law of Contract Act, Cap. 345 R.E. 2019. This provision states as hereunder:

> *"When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise."*

This position was given a boost through a judicial pronouncement in the case of ***Prismo Universal Italiana S.R.I v. Termoctank (T) Limited*** [2008] T.L.R. 403. The Court (Massati, J as he then was) remarked as follows:

> *"So I am certain in my mind that in law, subject to statutory exceptions, a contract need not be in writing and can be inferred from a series of letters or telegrams or faxes (or correspondence) or by the conduct of the parties."*

Reverting to the contention that no evidence existed to support the appellant's claim, my settled view is that the 1st appellate court had no reason to depart from the position held by the trial court. This is in view of the fact that the testimony of PW1 has demonstrated, sufficiently, in my view, that money changed hands from the appellant and the respondent. The testimony has given an elaborate account of how the decision was

arrived at to have the respondent given the responsibility of procuring construction materials.

PW2 has also given an account of how the appellant raised funds through a loan, and that she was privy to the plans that the appellant had on the money. There is also a testimony of PW3 who quoted the respondent admitting that he owed the appellant, though the quantum was not disclosed. PW1 has also testified on how she communicated with a mason in whose custody the materials were alleged to be. The latter was said to have admitted that some roofing tiles were delivered for his custody but the respondent came and took them from him.

In my considered view, the testimony adduced by the appellant was enough to justify the conclusion by the trial court that the respondent is indebted to the appellant. This ground succeeds but only with respect to the sufficiency of the evidence to prove the appellant's claim.

Ground two challenges the decision of the 1st appellate court to contend that the appellant ought to have preferred a criminal route to that of civil action.

Just like the preceding ground, this ground is predicated on a misconception of what the court held. For ease of reference, it is apposite

that part of the decision of the court be quoted, with all grammatical challenges, as follows:

> *"To add more nothing bar any claimant to opt for criminal or civil if a matter can fall in both holes. In this case it seems the respondent was interested in compensation and not punishment to the appellant. It is civil case since parties entered into that agreement and according to their testimony some of the materials were bought by the respondent and stored to constructor."*

This rules out the contention that the 1st appellate court ruled that criminal proceedings were a fitting recourse available to the appellant. Accordingly, I dismiss this ground of appeal.

Ground three of the appeal is hardly comprehensible, and matters are made worse with the fact that arguments raised do not support the ground of appeal. The contention in the submission revolves around what the appellant submitted in ground one of the appeal. The appellant has clung on the contention that the 1st appellate court held that the contract did not have a force of law on the ground that the same was oral, as opposed to the written contract. Since these arguments have been tackled in ground one, I choose to spurn them.

Regarding ground four, the argument is that the 1st appellate court erred when it failed to hold that the appellant had proved the case at the required standard of proof. The contention by the respondent's advocate is that the requirements of section 110 of Cap. 6 were not fulfilled, as the testimony adduced fell short of the balance of convenience, the standard set for proof in civil cases.

It is true, as both counsel unanimously argued, that success of a claimant in civil cases is depended on his ability to surmount this hurdle, and the decisions cited by the parties cement this view. What I consider to be the most epic of the decisions on the subject is that of the Court of Appeal of Tanzania in ***Paulina Samson Ndawavya v. Theresia Thomas Madaha***, CAT-Civil Appeal No. 45 of 2017 (unreported). In the said case, the upper Bench traversed far and wide and came up with two exquisite quotations which accentuate the role that an asserting party has in proving or affirming on the issue he alleges. The first is the excerpt extracted from the commentaries from Sarkar on Sarkar's Laws of Evidence, 18th Edn., ***M.C. Sarkar, S.C. Sarkar and P.C. Sarkar***, published by *Lexis Nexis* (p. 1896). The learned authors were quoted as stating that:

> ***"... the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue***

> ***and not upon the party who denies it; for negative is usually incapable of proof****. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason …. Until such burden is discharged the other party is not required to be called upon to prove his case.* ***The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party…"*** [Emphasis added].

The superior Court was also inspired by the holding of the legendary Lord Denning, made in the English case of ***Miller v. Minister of Pensions*** [1937] 2 All. ER 372. In that decision, this legal luminary laid a description of what a burden of proof is and how the same can be arrived at. He held as follows:

> *"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches of the same degree of cogency as is required to discharge a burden in a civil case.* ***That degree is well***

settled. It must carry reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say – We think is it more probable than not, the burden is discharged, but, if the probabilities are equal, it is not *…."* [Emphasis added]

Looking at the testimony adduced in support of the appellant's case, I retain no flicker of doubt that the appellant met this legal threshold to justify titling the scale in her favour. Such evidence has led me to conclude that it was more probable than not, that the respondent 'pinched' the hard earned sum of TZS. 20,000,000/- from the appellant. The testimony was more effective and potent than the respondent's casual denial which left a few questions unanswered. For instance, if the respondent's contention that he merely saved as a conduit that connected the appellant and the shop owner, the expectation was that the said shop owner is true, would be paraded to support the respondent's case. This, he did not do. I take the view that this is one of the fit cases in which the principle set in ***Hemed Said v. Mohamed Mbilu*** [1984] TLR 113, wherein it was held in part, as follows:

"According to law the person whose evidence is heavier than that of the other is the one who must win."

In my considered view, this ground of appeal is meritorious and I have no hesitation in allowing it.

The contention by the appellant in ground five is that the 1st appellate court erred when it held that the testimony adduced by PW3 and PW4 was hearsay and inadmissible. The respondent's counsel has maintained that the court was right in ordering that such testimony be disregarded for being worthless.

Before I delve into the substance of this issue, I need to lay a foundation on the law on admissibility of evidence. The general rule is that evidence can only be admissible if the same is direct. Anything else that is not direct is considered to be hearsay and inadmissible. It is considered to have failed the test set out in section 62 of Cap. 6.

In defining hearsay evidence the Privy Council held, in ***Subraminium v. Public Prosecutor*** [1956] W.L.R. 965, that hearsay evidence is an assertion of a person other than the witness testifying, offered as evidence of the truth of that assertion rather than as evidence of the fact that the assertion was made. The said Court went further and gave a description of what would constitute a hearsay evidence. It held:

> *"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be*

hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made."

The message distilled from the quoted excerpt is that the hearsay rule is simply an exclusionary principle which casts away any testimony other than that given by a person who directly perceived it. Reviewing the testimony adduced by the appellant's witnesses, my conclusion is that, while PW4's testimony was purely a third party account, gathered from the tale made by the appellant, and, therefore, inadmissible, that of PW3 is not. PW3 had a conversation with the respondent during which he told him that he owed the appellant some money and that he wanted the matter sorted out of court. This was a direct account from the respondent and it cannot be said that this was a third party account. The respondent was not a third party in this respect. It was inappropriate for the 1st appellate court to cast away the testimony of PW3.

Even assuming that the testimony of PW3 and PW4 is hearsay, which is not the case, I would still hold and I do, that the testimony of PW1 which has not been seriously controverted would be enough to prove that the appellant handed the sum to the respondent and that the same remains unpaid, to-date. This holding takes into consideration the fact that, in law, proof of the case is not dependent on the number of witnesses. It is the content of the testimony that matters and, in this case, the testimony of PW1 had what it takes to prove the case and tilt the scale in her favour. This view is predicated on the provisions of section 143 of Cap. 6, whose substance is as reproduced hereunder:

> *"Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for the proof of any fact."*

In view of the foregoing, I find this ground meritorious and I allow it.

In consequence of all this, I find merit in the appeal and I allow it. I quash and set aside the decision of the 1st appellate court and restore that of the trial court. The Appellant will have the costs of the matter.

Order accordingly.

Rights of the parties have been explained.

M.K. ISMAIL,

JUDGE

15/07/2022

DATED at **DAR ES SALAAM** this 15th day of July, 2022

M.K. ISMAIL,

JUDGE

15/07/2022