

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

PC CIVIL APPEAL NO.1 OF 2022

(Originating from Civil Case No.19 of 2021 at Bomang'ombe Primary Court & Civil

Appeal No.3 of 2021 in the District Court of Hai)

NEEMA EXAUD KIHUNDWA.....APPELLANT

VERSUS

PENDO BAKARI MWANGA.....RESPONDENT

26th July, 2022 & 20th October, 2022

JUDGMENT

MWENEMPAZI, J.

This is the second appeal by the appellant Neema Exaud Kihundwa. Initially, there was a civil suit no.19 of 2021 before Bomang'ombe Primary court. The appellant lost and appealed to the Hai District court, she again lost and hence this appeal which has three (6) grounds:



1. *That the District Court Senior Resident Magistrate erred in law and in facts in upholding that the trial court properly evaluated the evidence.*
2. *That the District Court Senior Resident Magistrate erred in law and in fact by upholding the trial court's judgment after he discovered that the opinion of the assessors were not at all considered and or taken in its judgment.*
3. *That the District Court Senior Resident Magistrate erred in law and in fact in upholding the finding that the Appellant to pay a sum of Tshs.7,655,000/= without the same being proved in evidence.*
4. *That the District Court Senior Resident Magistrate by upholding that the trial court properly erred(sic) admitted exhibit "K1" in evidence and considering it in its (sic) judgment while the same was not signed by the Appellant.*
5. *That the District Court Senior Resident Magistrate erred in law and in fact in erroneously referring to the group of Respondents a fact that does not exist.*
6. *That the District Court Senior Resident Magistrate erred in law and in fact by improperly holding that the Appellant did not challenge the admissibility of exhibit "K1" and by further holding*

that the appellant admitted to be indebted amount(sic) in exhibit

"K1"

Brief background to this appeal is, the respondent filed a civil suit before trial court for recovery of Tsh.7,555,000/= being payment and costs for banana deliveries via Scania motor vehicle . Upon the suit being heard on merit it was resolved in favor of the respondent. The appellant was quite uncomfortable with the decision and therefrom unsuccessfully appealed to Hai District Court vide civil appeal no.3 of 2021 thus the appellant landed into this court through this appeal.

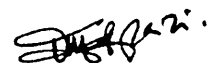
At the hearing of this appeal, the appellant appeared personally unrepresented while Mr. Englebert Boniface Learned Advocate represented the respondent. By consent of parties this court granted leave for hearing to proceed by way of written submissions in a set schedule. All parties submitted timely and the effort is appreciated.

Arguing ground 1 and 3 together the appellant faulted the decision of the trial court that it misdirected itself in evaluating evidence whereby it made reliance on appellant's proof of her innocence instead of the respondent to prove her case. She proposed that the issue raised by the trial court suggested that the duty to prove the case was put to the defendant/appellant and not the plaintiff/respondent. She contended that

an appellate court has legal mandate to interfere in the findings of the lower courts if there is misdirection in reaching to its findings or decision. She referred to the cases of **Bushangilang'oga vs Manyanda Maige [2002 TLR 335; Trevor Prince and Another vs Raymond Kelsal [1957]1 EA 752) CAK) and Joseph Lomayani & Another vs Melekizedek Michael [1997].**

In these cases, the courts among other things aired that an appellate court has a duty to itself evaluate evidence where there is apparent misdirection or misapprehension of evidence or where there is wrong drawn inference from evidence. Reasonably therefore the appellant is asking the court to interfere with the concurrent findings of the lower courts by re-evaluating the evidence.

As per the 2nd ground the appellant argued that the opinions of the assessors have not been taken nor shown that the trial Magistrate considered them. Citing Section 7(1)(2) & (3) of the Magistrates Court Act, Cap. 11 R.E.2019, she argued that it is a requirement of the law that the Primary Court when hearing the case to sit with at least two assessors and that signatures appear at page 5 of typed judgment but nowhere that suggests they had given their opinion nor has it been shown that the Magistrate considered their opinions. She therefore urged the court to



declare the trial court decision null and void by invoking the decisions in the cases of **Mugeta Malago and Another vs Amosi Pamba, Pc Criminal Appeal no.25 of 2019 and Agness Severini vs Mussa Mdoe [1989] TLR 164 (CA).**

The 4th and 6th grounds were combined and argued together. The appellant argued that the trial court relied on exhibit 'K1' which shows Tsh.7,555,000/= as due amount after calculations. That the exhibit bears no appellant's signature to authenticate the evidential value of the exhibit. That no evidence that the exhibit was prepared by both parties rather it is a document that was prepared by the respondent alone, tendered in court and relied by the trial court as proof of debt against the appellant.

She further argued that first appellate court erroneously construed the evidence of the appellant that she never disputed admissibility of exhibit 'K1'. She suggested that the trial court admitted the same into evidence before it was cleared of admissibility. She concluded that the document ought not to have been accorded any weight.

On his part Mr. Kimaro stated that before first appellate court, five (5) grounds of appeal were raised but surprisingly six (6) grounds featured in this appeal. He faulted this as offending the requirement of law that as a matter of general principle, court will only look into matters which came

up in the lower court. To buttress his contention, he referred to the case of **Godfrey Wilson vs Republic, Criminal Appeal No.168 of 2018(unreported)**. He urged the court to disregard 5th ground.

Arguing on ground 1 and 3, Mr. Kimaro submitted that, the issues framed by the trial court imply that the respondent was able to prove her case on the balance of probability. That exhibit 'K1' was tendered without objection by the appellant and admitted by the court thus proof on balance of probability. He argued that where undeniable exhibits are tendered in court then on the balance of probability the case is proved referring to the case of **Masanyiwa Shindano vs Maryciana Shabani, Pc Appeal No.08/2020 HC Mwanza(tanzlii)**. He further submitted that objections ought to have been raised before the admission of the exhibit where he referred to the case of **Shihoze Semi & Another vs Republic [1992] TLR 330**.

Further on he argued that the trial court raised the issue, I quote," je *mdaiwa alimlipa mdai kiasi cha shilingi 3,570,000/=*? Literally to mean as to whether the appellant paid some of the money she owes the respondent. The Learned Counsel stated that the issue was framed following the appellant's allegation that she paid some of the money but the respondent denied, thus it was apparent the appellant was duty bound

to prove her claim. He referred to Section 110 of the Evidence Act, Cap 6 R.E.2019 now 2022.

The 2nd ground was argued that, two set of assessors to wit: Witness Muro and Velynice Msuya participated fully in the whole hearing and their opinions were considered accordingly and that trial court decision was a result of the finding of majority. That the assessors also did sign the judgment thus revealing to have agreed on what is written. He added that there is no law requiring the opinions of members of primary court to be recorded in the case file by a magistrate and cited the case of **Buruno Sospeter and Mapinduzi Sospeter vs Salvatory Buyenga, Pc Civil Appeal No,32/2020(Unreported)**.

On ground four and six he argued that nowhere in the proceedings the trial court denied the appellant to question the tendered exhibit. Citing the case of **Lukas Kasato vs Charles Pantony & Others, Pc Criminal Appeal No 26 of 2019(tanzlii)**, he argued that the court followed the whole procedure of tendering exhibits. That, the appellant was given a right to respond and she did, ultimately the court found the exhibit to hold water thus relied on it to make the decision.

In the rejoinder the appellant reiterated her submission in chief and urged the court to quash and nullify the judgment of the lower courts with costs.

I have considered the grounds of appeal and lengthy submissions by both parties. I have also had ample time to go through the records of this case at all court levels. Before interfering with the decision of the two subordinate courts, as this is a second appeal, this Court has to determine as to whether there is/are lucid reasons to do so. See the case of **Mafuru Manyama & Two Others vs Republic, Criminal Appeal no.256 of 2007(unreported)**. Having cautioned myself as such, I will now get on examining the five grounds of appeal.

But before further ado, the court finds it pertinent to point out matters which are not in dispute. Basing on the records for the case it is undisputed that, the basis of this matter is civil suit no.19/2021 that was instituted by the respondent Pendo Bariki Mwanga and decided in her favor. It is also undisputed fact that the district court in appellate proceeding upheld the trial court decision. It also undisputed that both parties were doing banana business from November,2020. Furthermore, it is undisputed that the total debt against the appellant had amounted to 7,555,000/= by the third and last banana delivery.

I will now embark to determine the grounds of appeal starting with the 1st and 3rd concerning failure to properly examine the evidence. Now, these grounds need not detain me extensively, as the records are clear



that the 1st appellate court did properly evaluate the evidence as can be seen at page 3 of said court where the Honorable Magistrate made her finding after analysing the evidence. The issue of undisputed debt of Tsh.7,555,000/= was addressed in paragraph 3. The issue of burden to prove the alleged paid amount of Tsh.3,570,000/= by the appellant which she(appellant) failed to meet required standard of proof was well analysed in paragraph 5 and in page 4 at paragraph 1.

I as well do not agree with the contention that the appellant cleared some of the debt to wit Tsh.3,570,000/= because her testimony and that of her witnesses do not support it. To be precise she informed the trial court that on 27/12/2020 she paid Tsh.2,000,000/= and 31/12/2020 Tsh.1,000,000/= both through one Yusuf Dunga-an agent. Then on 02/02/2021 Tsh.570,000/= through an agent called Faridi Titu. Now these agents, nor did they tender their registrations to prove their agency nor did they tender certified mobile money transaction printouts for such transactions. No copy of letter allegedly addressed to service provider (Airtel) has been exhibited before the court. Likewise, there was no evidence shared proving the appellant made follow ups. Since, this is a Court of law and not speculation, therefore the unsupported claim cannot be entertained. It is a requirement of the law that he who alleges must prove. Specifically, **Regulation 2(3) of the The Magistrates' Courts**

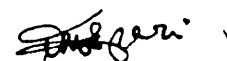
(Rules of Evidence in Primary Courts) Regulations G.N. No.22 of 1964 provides: -

"Where the defence to any civil case is that there are other facts than those proved by the claimant and that such other facts will excuse him from liability to meet the claim, or where any fact is especially within the knowledge of the defendant, the defendant must prove those other facts."

These grounds are therefore without merit.

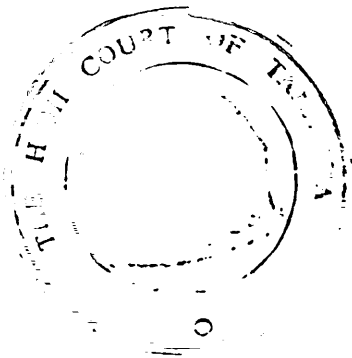
On the second ground of appeal the appellant complained that the first appellate court erred in law and fact by upholding trial court decision while the opinions of the assessors weren't taken and considered. Going through the judgment of the first appellate court the records are very clear that the court noted that the opinions were duly taken and considered by the trial court as it can be seen in page 4 at paragraph 3. She rightly held that the assessors unanimously opined that the respondent has proved her claim and that was the decision given by the trial court. Hence, I find the ground lacking in merit.

The 3rd and 5th grounds also collapse having determined the 1st, 2nd and 3rd grounds as they all touch the issue as to whether the claim of



Tsh.7,555,000/= has been proved against the appellant. The same has been answered in determining the 1st ground of appeal.

In the upshot I conclude that the two lower court decisions need not be disturbed. The appeal before this Court is devoid of merits and is consequently dismissed with costs. It is so ordered.



T. M. Mwenempazi

T. M. MWENEMPAZI

JUDGE

20th OCTOBER, 2022