IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

CIVIL APPEAL NO. 15 OF 2021

(Arising from the decision of The Kilosa District Court in Civil Appeal No. 19 of 2021, Originating from Civil Case No. 111 of 2020, Kilosa Urban Primary Court)

KWEGE SAID SEGESELA ..... APPELLANT

VERSUS

SAMWEL YOHANA ..... RESPONDENT

JUDGMENT

5th May & 25th Oct, 2022

CHABA, J.

This is a second appeal from the judgment and decree of the District Court of Kilosa which overturned the decision of Kilosa Urban Primary Court in Civil Case No. 111 of 2020. The appellant, Kwege Said Segesela successfully sued the respondent before the Primary Court for Tshs. 9,400,000/= which is an unpaid debt the respondent had allegedly borrowed from appellant.

The parties were acquainted to each other, the appellant being a civil servant and the respondent an entrepreneur who was running a microcredit enterprise. In the year 2017, the appellant used to borrow money from the respondent and repay through salary, the ATM card of her account was held by the respondent for security and deductions of the debt.

On 14th March, 2019 the appellant deposited Tshs. 9,400,000/- in the respondent's NMB Account No. 21810003624. On 25th June, 2021 the appellant wrote a demand letter to the respondent requiring him to

repay the debt. It appears that the demand letter was not adhered to, hence on 29th June, 2021 the appellant instituted the case before the Kilosa Urban Primary Court for repayment of her monies Tshs. 9,400,000/=.

After a full trial, the Primary Court awarded the claim as prayed, but the respondent was unhappy and therefore appealed to the District Court of Kilosa which ruled that the respondent's evidence was heavier than that of the appellant. To reach to her decision, the first appellate court placed reliance under the provision of section 110 (1) and (2) of The Evidence Act [Cap. 6 R.E. 2019] and Rule 6 of the Magistrates Courts (Rules of Evidence in Primary Court) Regulations, GN No.22 of 1964 where it quashed the decision of a trial court, set aside the decree and orders emanated therefrom. Dissatisfied, the appellant preferred this appeal and fronted the following grounds: -

1) That, the Appellate District Court erred in law and in fact for holding that the appellant herein failed to establish and prove her case at the trial court. The evidence adduced by the appellant herein at the primary court established and proved her claims to the required standard.
2) That, the District Court erred both in law and fact for basing its decision on matters not raised and submitted by the respondent herein.
3) That, the District Court erred in law and in facts when it evaluated only the evidence of the appellant herein and left the evidence of the respondent untouched.
4) That, the appellate District Court erred in law and in fact for being biased upon ruled in favour of the respondent at the prejudice of the appellant.

On 31/03/2022, when the matter came for hearing, Mr. Saul Sikalumba, the learned counsel for the appellant prayed the matter be disposed by way of written submissions. Mr. Bahati Kashoza, learned counsel for the respondent conceded. Both parties adhered to the court's scheduling orders by submitting their respective written submissions in time.

To support the appellant's appeal, Mr. Sikalumba submitted by covering all grounds of appeal. The 1st ground was argued separately and the rest were taken jointly. On the first ground, Mr. Sikalumba submits that the appellant succeeded to prove her claim based on the balance of probability. He argued that the District Court being the first appellate court erred in its holding due to its failure to compare the evidence. He pointed out that, there was no dispute that the appellant deposited Tshs. 9,400,000/= to the respondent's account but the District Court failed to believe that such an amount of money was paid as a loan for one reason that the said slip did not contain such statement. Instead, the District Court ruled that the said amount was settlement of the outstanding debt while still the said slip did not bear any information to that effect. He submitted that the amount claimed as an outstanding debt against the appellant was Tshs. 5,916,000/= and the security was her salary because she surrendered her ATM Card for monthly deductions, and the same had to be returned upon settlement of the debt. Return of the ATM Card implied that the appellant had no any outstanding debt. The learned counsel highlighted that the evidence of the appellant was heavier than that of the respondent as it was underscored by this court in the case of **Hemedi Said Mohamed Mbilu, [1984] TLR 113.**

Dealing with the last three grounds of appeal, the learned counsel accentuated that the first appellate court delt and evaluated only the

evidence adduced by the appellant and the bank slip, but without taking into consideration of other evidences. He made reference to legal principle *nemo judes in causa sua* meaning; *no one should be a judge in his or her own cause* and stressed that justice should not only be done, but manifestly be seen to be done. He insisted that the appellate court acted with bias citing the case of **Happy Sausages Ltd and Others vs. Registered Trustees of Social Action Trust fund and Another,** Civil Appeal No. 70 of 2002, CAT Arusha, where the Court held among others that:

> *"The test of apparent bias is whether the alleged circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the court was biased".*

He referred this court to another persuasive case of **Newswalch Comm. Ltd vs. Atta [2006] ALL FWLR (Pt 318)** insisting on fair hearing. He maintained that the District Court was not impartial by deciding that the money deposited in the respondent's account was for payment of the debt, while at the same time failed to explain under which circumstance the ATM Card was returned to the appellant without clearing the outstanding loan. Mr. Sikalumba underlined that since the first appellate court delt only with one party and left the other party untouched, not only the court was biased, but also prosecution of one party's case was against the law as it was underscored in the case of **Baraka Saidi Salum vs. Mohamed Saidi, [1970] HCD 95,** that it is for the party to present his case and not the court to make a case for litigants. In another case of **Joseph Marko vs. Paschal Rweyemamuz, [1977] LRT 59,** it was held that when a magistrate

assists one party, it will be difficult to display allegations of bias. He finally concluded by praying this court to consider the appellant's grounds of appeal and allow the same with costs.

On the other hand, the learned counsel for the respondent. Mr. Kashoza commenced to argue by discrediting the adverse party's submissions as flawed, based on serious misconception and misdirection of law and evidence contending that this court should dismiss this appeal. Arguing in respect of the first ground, Mr. Kashoza submitted that the evidence adduced by the respondent at the trial court was cogent and heavier than that of the appellant. He cited the case of **Mary Wanjiku Gachigi vs. Ruth Muthoni Kamau [2003] 1EA 69** and argued that the appellate court cannot interfere with the trial court's findings of fact unless the trial court acted on a wrong principle. To him, the Primary Court acted on a wrong principle for having no evidence to support her decision. On this facet, he referred to this court to the case of **Hemedi Saidi vs. Mohamedi Mbilu** (Supra).

Regarding the 2nd, 3rd and 4th grounds, Mr. Kashoza invited this court to visit the first appellate court proceedings which to him it shows that parties were afforded an equal opportunity to be heard. He cited the case of **Halfani Sudi vs. Abieza Chichili [1998] TLR. 527** and **Paulo Osinya vs. R [1959] EA 353** on presumption of sanctity of court record.

In an attempt to dismantle the allegation of bias, which he said was very serious one he averred that if the proceedings were to be tested against **Happy Sausage Ltd's** case, there was no bias. Both parties were afforded an opportunity to state their respective cases. He ended his submission by highlighting that the first appellate court

decided the matter fairly after evaluating the evidence received from both parties.

In determining this appeal, I am now prepared to resolve the question on the merit of the appeal. However, before going any further, I wish to establish the floor upon which the judgment must stand. I will start by pointing out the relevant principles governing appeals and then, I will highlight briefly the duty of appellate courts.

First and foremost, the trial court is bound to evaluate the evidence before it thoroughly and make its finding on both law and facts which are relevant to the case. **Secondly,** where it appears that the trial court did not make a proper analysis or at least there is a complaint raised in the appeal that the evidence or law were not properly appreciated, the appellate court can re-evaluate the evidence and reach to its own finding. **Thirdly;** It is trite law that matters of fact and credibility of witnesses are in the trial court's domain and thus findings on that sphere may not be easily overturned by the appellate court(s) unless there is a serious misapprehension of facts or law or where there is a miscarriage of justice. The above principle will apply much stricter in a second appeal, and even strictest when the trial court and the first appellate court had concurrent findings. There is a number of legal authorities on this principle. For instance, in **Peters vs. Sunday Post Limited (1958) EA 424,** it was held: -

> *"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that*

evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion."

The above has been followed in our jurisdiction through various decisions, including the cases of **Damson Ndaweka vs. Ally Saidi Mtera,** Civil Appeal No. 5 of 1999, **Bushangila Ng'oga vs. Manyanda Maige,** [2002] TLR. 335 and **Japan International Cooperation Agency (JICA) vs. Khaki Complex Ltd,** Civil Appeal No. 107 of 2004 (unreported), where the Courts have expounded the principle in different dimensions.

I am aware that in the case at hand, the courts below did not have concurrent findings of facts. As alluded to earlier, the first appellate court quashed the decision of the trial Primary Court. Therefore, although this appeal is before the second appellate court, this court may have much more liberty just like the first appellate court would have.

Starting with the first ground which is based on the complaint that the District Court erred by holding that the appellant failed to establish her case at the trial court while she proved her claims to the required standard, I think that to rule whether the District Court erred or otherwise, no doubt that the first appellate court had an ample time to go through and perhaps carefully examined the trial court proceedings. According to the evidence adduced before the trial court, the appellant testified that the respondent requested her to lend some money amounting to Tshs. 10,000,000/=. Because she did not have that amount at a time, she promised that she (the appellant herein) would lend him the amount when her pension would be paid. The evidence shows that the respondent kept on reminding the appellant to lend or

grant him the money he wanted and sometimes used to visit the appellant at home. When the appellant was paid her pension monies, she lent the respondent Tshs. 9,400,000/=. They had agreed that the respondent would repay the same in 2020, but he did not pay it. She faced him several times asking him to repay the debt but he used to give empty promises. Then she decided to consult a lawyer who prepared a demand letter but the respondent rejected the service. The deposit slip and the demand letter were admitted as exhibit M1 and M2 respectively.

She continued that she knew the respondent for a time and she used to treat him as her own son, that is why when he faced her, she devoted to assist even without having a formal written contract. She herself used to borrow money from the respondent who was running a microcredit business. All loans she secured from the respondent were paid even before she retired, the respondent retained her ATM Card as a security so, he was deducting the debt by withdrawals. After the debt was cleared, she was given back her ATM Card.

The respondent in his defence strongly denied to have borrowed any money from the appellant, but admitted the following facts; *one:* That several times in 2017 the appellant borrowed money from him through his business and he used to retain the appellant's ATM Card for security and deduction of the loan. *Two:* That the said loans were being repaid through the appellants salary. *Three:* that he returned the appellant's ATM Card. *Four:* that the appellant actually deposited the said amount of money Tshs. 9,400,000/=.

What he disputed was the purpose of the said deposit. He claimed that the appellant used to borrow some money which accumulated up to Tshs. 9,400,000/= and promised to pay upon receiving her pension.

When she received her payment, she freely decided to deposit Tshs. 9,400,000/= to pay the debt. He tendered some loan agreements between him and the appellant but didn't tally on the amount.

Before the trial court, the law applicable was the Magistrate Courts (Rules of Evidence in Primary Court) Regulations. Rule 1 (2) of the Schedule to the Rules provides on the burden of proof in the following words: -

> *"Where a person makes a claim against another in a civil case, the claimant must prove all the facts necessary to establish the claim unless the other party (that is the defendant) admits the claim."*

Rule 6 provides for the standards of proof in civil matters as correctly submitted by both learned counsels which is a balance of probability. However, in the circumstance of this case, apart from burden of proof on the appellant, there was a relevant provision which the first appellate court had to consider during examination of the evidence before her. This provision of the law is rule 2 (3) of The Schedule to The Rules of Evidence. It read:

> *"Rule 2 (3) 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."*

Also taking the popular case of **Hemedi Said Mohamed Mbilu [1984] TLR. 113** in which I have observed that the person whose evidence is heavier than that of the other is the one who must win, gives a necessary inference that there must be evidence on both sides,

though the defendant will not assume the evidential burden of proof, under some circumstances, the defendant must establish his case if he would wish the court to decide on his favour, as indicated under rule 2 (3) above.

In this case, the defendant claimed that the money so deposited was for payment of the outstanding debt. Claims of that kind falls under rule 2 (3) referred herein above. So, the defendant was also bound to establish that there was a debt against the appellant. Even in deciding, the first appellate court was duty bound to follow the facts and apply them properly to the rule. Commendable is the trial court, for it weighed properly the evidence of both sides that is why it tried to see if the loan agreements would prove the debt to be Tshs. 9,400,000/=.

The other important principle relevant and that was important to consider is that of demeanour and credibility of witnesses. Generally, every witness deserves to be believed unless there are factors to disbelieve him/her. The District Court at its appellate jurisdiction decided not to believe the appellant that the said Tshs. 9,400,000/= was deposited into the account of Samwel Yohana, the respondent in the agreement to lend the respondent giving reasons that there was no contract and the said pay in slip (Exhibit M1) did not have any statement showing the purpose of the deposit. The worry which touched the appellant's counsel, Mr. Sikalumba has echoed also in my reasoning, if the first appellate court decided to disbelieve the appellant on the ground that there was no agreement and the deposit pay slip had no statement explaining the purpose for depositing the money, now the question which arises in my mind is, how could he believe the respondent that the said money was for repayment of debt when the said debt was not proved, meanwhile no agreement tendered as an

exhibit to prove the fact in issue and the deposit slip did not state such purpose.

In my considered opinion, it is worth noting that the standard of probability, should be understood this way, that by considering the facts of the case and applying holistic approach, whether the facts may have happened. I have asked myself the other way round, if the appellant, a senior citizen and retiree from public service, who used to be a client to the respondent would frame false claims of Tshs. 9,400,000/= against the respondent knowing clearly that they were false. In my study of the facts, despite the absence of a contract to that effect, I am comfortable with her testimony before the trial court was so unlikely to be concocted. I am of the view that, the trial court and the first appellate court parted ways in their application of the rule on standards of proof. It is for that reason, I vote to refer to the case of **Mr. Mathias Erasto Manga vs. M/S Simon Group (T) Limited [2014] T.L.R. 518,** where the Court of Appeal devotedly comprehensively expounded the concept of proof on balance of probability. Having referred to the case of **MILLER vs. MINISTER OF PENSIONS** (1937) 2, ALL ER 372 it referred to Lord Denning (M.R.) at p. 374 thus:

> *"It must carry a 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 it is more probable than not'*** *the burden is discharged ...*
>
> Again, in Re Minor (1966) AC 563 at 586 it was held: "*The balance of probability standard means a court is satisfied an event occurred if the court considers that,* ***on the evidence the occurrence of the event was more likely than not***".

The court proceeded to insist that the yardstick of proof is the evidence available on record and whether it tilts the balance one way or the other. Further cautioned that departing from the yardstick by requiring corroboration is going beyond the standard of proof in civil cases. This is what I opined that the first appellate court was tempted into.

Otherwise, the trial court which had the chance to examine the witnesses, would have a perfect verdict of fact than the first appellate court and perhaps this court. My scrutiny of the evidence before the trial court gives an objective judgment that the evidence by the appellant was heavier than that of the respondent, she managed to prove her case against the respondent. To this end, the first ground therefore is answered in affirmative, that the District Court erred in fact when it ruled that the appellant failed to prove her case against the respondent on weight of evidence.

Regarding the second, third and fourth grounds, I first appreciate the good arguments advanced by both sides and the serious research conducted on what actually constitutes *bias* on one hand, and *sanctity of court record* on the other hand. I accept all the principles set by the legal authorities cited to this court as correct statements of the law, even without mentioning them discriminately.

However, having considered the circumstances and the proceedings of the case, this court finds no apparent indicator of bias in relation to the District Court. I am aware Hon. Masewa, RM was not the first magistrate to be assigned with the appeal. Hon. Millanzi, RM had the case but he recused himself on 21/10/2021 after a serious complaint of bias and prejudice. I may observe that Hon. Masewa, RM being a succeeding magistrate would hardly be immune from allegations of bias,

especially when the same party apprehending bias previously loses the case. Having closely examined the lower courts proceedings, I am of the view that, the first appellate court's fault was in his reasoning, a common fault which I do not think would be treated as manifestation of bias. In the same vein, I find no extraneous factors imported by the appellate court as the appellant contended. That being the finding, I rule that grounds two and four have no merits and dismissed altogether, but ground one and three are meritorious and I allow the same.

On the strength of the above observations of the lower courts' records and findings of this court, I am of unfeigned opinion that the weight of the first and third grounds, drives me to rule that this appeal has merit, and it is hereby allowed with costs. It follows therefore that the judgment and decree of the first appellate court are quashed, and the orders sprang therefrom are set aside. Thus, the judgment, decree and orders of the trial primary court are restored, sustained and upheld as well. **Order accordingly.**

DATED at **MOROGORO** this 25th day of October, 2022.

M. J. Chaba

Judge

25/10/2022