

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

DC. CIVIL APPEAL NO. 06 OF 2022

*(Originating from Mbinga Urban Primary Court in Civil Case No. 117 of 2021 and Civil
Appeal No. 15 of 2021 of Mbinga District Court)*

FADHILI MBWANA APPELLANT

VERSUS

RAYMOND WILLIAM KOMBA RESPONDENT

JUDGEMENT

31/10/2022 & 08/11/2022.

U.E Madeha, J.

The Appellant through Civil Case Number 117 of 2021 before Mbinga Urban Primary Court was sued by the Respondent who was claiming the sum of five millions, nine hundred and forty-one thousands Tanzanian shillings (5,941,000/=). The Respondent claimed that the Appellant had borrowed that amount of money and he was requesting for its return.

As a matter of fact, the Appellant denies the claim and he claimed that he was not given the money by the Respondent. On the same note, the Respondent agreed that the money he owed him was not actually given to

the Appellant by him but he gave that money to someone else who sent to the Appellant. Additionally, the Appellant stated that there is no proof that he received that money from the Respondent.

The trial Court dismissed the Respondent's claims on the ground that the case was not proved on the balance of probabilities. Moreover, the Respondent filed an appeal at the District Court of Mbinga vide Civil Appeal No. 15 of 2021. In that appeal, the decision of the trial Court and its orders were set aside and the Appellant was ordered to pay the Respondent an amount of five millions, nine hundred and forty-one thousand (5,941,000/=) Tanzanian shillings within sixty (60) days from the judgment date. The Appellant was aggrieved with that decision and through the services of advocate Geoffrey Sangana, he appealed before this Court and he has raised three (03) grounds of appeal, to wit:-

- 1. That, the appellate Court erred in law and in facts when it entertained the matter that was heard by Mbinga Urban Primary Court contrary to the requirements of the Evidence Act and the Electronic Transactions Act.*
- 2. That, the appellate Court erred in law and fact to decide the case in favour of the respondent without strong evidence to support the same.*

3. That, the appellate Court erred in law and fact to decide the matter without considering the Appellant's evidence.

This appeal was canvassed by way of written submissions. The Appellant enjoyed the services of none other than the learned advocate Mr. Geoffrey Sangana. On the other hand, the Respondent was represented by none other than the learned advocate Mr. Moses Ndunguru.

The Appellant's learned advocate, Mr. Geoffrey Sangana submitted that the judgment was based on the text message alleged to be shown to the trial Court while in reality there is no evidence to support the Respondent's claims. On the same note, he argued that if there was any extracted message from the mobile phones, the Respondent would have requested the same from mobile networks provider such as Vodacom, Airtel, Tigo and Halotel. However, he submitted that there was no any extract that was tendered before Mbinga District Urban Primary Court by the mobile networks provider to prove that there was a mobile communication between the Appellant and the Respondent.

With regard to the second (2nd) ground of appeal, Mr. Sangana contended that the Respondent gave money to Samson Magoha and there

is no proof to show that the Appellant received that amount of money since there is no witness who testified that he saw Samson Magoha handing over the said amount of money to the Appellant. He further argued that it is the requirement of the law that the Respondent had to prove its case in the balance of probabilities. Reference was made to the case of **Godfrey Sayi v. Anna Siame (as a legal representative of the late Mary Mndolwa)** Civil Appeal No. 114 of 2012, Court of Appeal of Tanzania at Dar-es-Salaam (unreported) where it was observed that;

"That is the cherished principle of law that, generally, in civil cases, the burden of proof lies on the party who alleges anything" also it is similar common knowledge that in civil proceedings, the party with legal burden also bears the evidential burden and standards in each case is on the balance of probabilities."

To crown it all, he further submitted that in view of the aforesaid the Respondent was ought to prove that Samson Magoha handed to the Appellant the said amount of money. In that regard, he averred that under those circumstances the Respondent failed to prove his case on the balance of probabilities. In fact, there was no proof showing that the Appellant received that amount of money (five million, nine hundred and forty-one

(5,941,000/=) Tanzanian shillings. Moreover, the Appellant's learned counsel prayed that the judgment and decree of the first appellate Court to be set aside.

Principally, Mr. Moses Ndunguru the Respondent's learned advocate submitted that the learned counsel for the Appellant submitted the grounds of appeal which are different from the grounds set in the petition of appeal. Additionally, he further averred that the Appellant had dropped his grounds of appeal. To add to it, he argued that during the trial the Respondent was able to tender mobile extracts while giving evidence. To crown it all, the Appellant did not question the truthiness and worthiness of the messages in that regard this implies that the messages were correct.

On the second (2nd) ground of appeal the Respondent's learned counsel averred that the appellate Court was correct in deciding in favour of the Respondent. Basically, during the trial the Respondent testified that he gave to the Appellant an amount of five millions nine hundred and forty one thousand (5,941,000/=) as a loan. Moreover, that money reached the Appellant through the hands of Samson Magoha in other words Samson Magoha was sent to deliver that amount of money to the Appellant.

He averred that; the Appellant did not deny the fact that he received that amount of money from Samson Magoha. Unfortunately, the Appellant's evidence was to the effect that there was no one who witnessed when Samson Magoha gave such amount of money and the claim is baseless.

He further argued that the case was proved on the balance of probabilities and the weight of the Respondent's evidence was greater than that of the Appellant. He cited with approval the *Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations, GN, No. 22 of 1964 and No. 65 of 1972*, which provide under regulation 6 as follows;

'In civil cases, the Court is not required to satisfy beyond reasonable doubt that the part is correct before it decides the case in its favour, but it shall be sufficient if the weight of evidence of one party is greater than the weight of evidence of the other.'

Having gone through the petition of appeal which encompasses three (03) grounds and the submissions made by the learned counsel of both parties, I find they boil down to two (02) issues namely; **first**, whether this case was proved on the balance of probabilities; and **second**, whether the messages were properly admitted or the required procedures of the Evidence Act (Cap. 6 R.E 2022) and the Electronic Transactions Act were considered.

To start with the issue of whether this case was proved on the balance of probabilities, the Respondent had a duty to prove on the balance of probabilities that he gave the money to the Appellant. As a matter of fact, the only reliable evidence is the evidence of the mobile-phone messages. On the same note, the Appellant's learned advocate claims that there is no print-out of those messages and they does not prove the claim made by the Respondent. On the other hand, the Respondent's learned advocate claims that those messages prove that the Appellant was given that money by a third party named Samson Magoha who testified in court.

Likewise, from all this I have seen and observed to the best of my knowledge that there is no enough evidence to convince this Court that the Appellant was given money by the Respondent. To add to it, in this case they allegations made by the respondent that Samson Magoha gave that amount of money to the Appellant was not proved.

Considering the issue of communication through mobile-phone messages between the Appellant and the Respondent, the Respondent has no print out of the mobile-phone messages. Similarly, he tendered the mobile-phone messages which was directly taken from the phone of the Respondent. From the foregoing arguments of both parties, I agree with the

idea of the Appellant's learned advocate who submitted that mobile-phone messages should not be used without being printed out by the required authorities. On the same note, the exhibit tendered which was extracted from the mobile phone was actually produced as secondary evidence and its reliability, integrity and authenticity are left in question.

In fact, section 66 of the Evidence Act (Cap. 6, R.E. 2019) requires all documentary evidence to be proved by primary evidence. It is the view of this Court that the evidence was given contrary to the law and in that regard, it is expunged from the Court's records.

To crown it all, I hereby quote and make reference to sections 64, 65 and 66 of the Evidence Act (Cap. 6, R.E.2022) which requires that the documentary evidence must be proved by primary evidence.

"64. (1) Primary evidence means the document itself produced for the inspection of the Court. (2) Where a document is executed in several parts, each part is primary evidence of the document. (3) Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it. (4) Where a number of documents are all made by one uniform

process, as in the case of printing, lithography or photography, each is primary evidence of the contents, of the rest; but where they are all copies of a common original, they are not primary evidence of the contents of the original.

64A.- (1) In any proceedings, electronic evidence shall be admissible. (2) The admissibility and weight of electronic evidence shall be determined in the manner prescribed under section 18 of the Electronic Transaction Act. (3) For the purpose of this section, "electronic evidence" means any data or information stored in electronic form or electronic media or retrieved from a computer system, which can be presented as evidence.

66. Documents must be proved by primary evidence except as otherwise provided in this Act."

To add to it, the second (2nd) issue is whether the messages were properly admitted or the required procedures of the Evidence Act (Cap. 6 R.E 2022) and the Electronic Transactions Act were considered.

With the foregoing, I have carefully considered the wording of section 60 of the Tanzania Evidence Act (supra) and section 18 of the Electronic Transactions Act. Section 18 of the Electronic Transactions Act does not prohibit receiving electronic evidence, although what is required is to be proved along with other things is the weight of the evidence, preservation

and integrity of the electronic evidence. Notably, section 18 of the Electronic Transaction Act provides a guideline that electronic evidence can be received depending on the weight of the evidence and the preservation and integrity of the electronic message stored. But section 62 of the Evidence Act Cap. 6 (supra) requires that the documents must be proved by primary evidence except as otherwise provided in this Act. Section 18 (2) of the Electronic Transactions Act reads as follows;-

"2) In determining admissibility and evidential weight of a data message, the following shall be considered;-

(a) the reliability of the manner in which the data message was generated, stored or communicated;

(b) the reliability of the manner in which the integrity of the data message was Electronic Transactions Act (Cap. 442 R.E. 2022) 11 maintained;

(c) the manner in which its originator was identified."

With regard to the issue of whether the messages were properly admitted or the required procedures of the Evidence Act (Cap. 6, R.E 2022) and the Electronic Transactions Act were not considered, I have keenly and carefully read section 18 of The Electronic Transactions Act (Act No. 13 of 2015), which deals with the admissibility of data messages. Additionally, the

provision allows the admissibility of data messages and in admitting the electronic evidence the Court has to look on the reliability, integrity and authenticity of the data messages in its generation storage and production before they are admitted in Court. Section 18 of the Electronic Transactions Act (Act No. 13 of 2015), stipulates the functional equivalent principle, by which an electronic data message is placed on the same footing as traditional paper-based transactions. This implies that the requirements governing the admissibility of documentary evidence, which are relevant are still applicable. Reference is made to the case of **Emmanuel Godfrey Masonga v. Edward Franz Mwalongo & Others**, Miscellaneous Civil Cause No. 6 of 2015 (Iringa District Registry) where it was held that before its admissibility, the reliability, integrity and authenticity must be cleared out first. Also, section 20 of The Electronic Transactions Act (Act No. 13 of 2015) requires that any data message must be produced as an original document. Considering the said exhibits there is no dispute that they were directly extracted from the phone by the Respondent. In fact, that implies that they were given as secondary evidence and their reliability, integrity, and authenticity are left in question.

It is important to note that Section 66 of the Evidence Act (supra) and Rule 11 (1) of The Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations G.N. No. 22 of 1964 requires all documentary evidence to be proved by primary evidence. Consequently, I am of the view that the messages were given contrary to the law, and in that regard, they are expunged from the records of the case.

On the other hand, after going through the phone messages, I find that there is no evidence to show that the Appellant owes money to the Respondent. In all fairness, under the prevailing circumstances of this case, this Court holds that this case was not proved on the balance of probabilities as submitted by the Appellant's advocate. There is no evidence to prove that the Appellant took a loan of five million, nine hundred and forty-one thousand Tanzanian shillings (5,941,000) from the Respondent through evidence of phone messages. The Respondent's evidence was scant to prove that the Appellant owes money to the Respondent.

From the foregoing discussion, this appeal is allowed. To put it in a nutshell, the judgment of the District Court is quashed and its orders are set aside. I uphold the judgment of the trial Court, which dismissed the

Respondent's claims. I find it is prudent to order each party to bear his own costs. Order accordingly.

DATED and **DELIVERED** at Songea this 8th day of November, 2022.


U. E. MADEHA

JUDGE

08/11/2022

