

**IN THE HIGH COURT OF TANZANIA
AT TABORA
PC. CIVIL APPEAL NO. 2 OF 2020**

*(Arising from Tabora District Court Civil Appeal No. 9 of 2019 and
Originated from Civil Case No. 47 of 2019 Primary Court Sikonge.)*

HAMIS MAYUNGA.....APPELLANT

VERSUS

SARAH ANTHONY.....RESPONDENT

JUDGEMENT

Date of Last Order: 28/10/2022

Date of Delivery: 14/12/2022

AMOUR S. KHAMIS, J:

This is a second appeal against a decision of Sikonge Primary Court in Civil Case No. 47 of 2019 where Hamis Mayunga Mtusi who is the Appellant in the instant appeal, successful claimed for Tshs 2,000,000/= as a loan advanced to the Respondent in 2018.

The record shows that in July 2018 the Appellant advanced loan to the Respondent on consideration that respondent's seven heads of cow will be used as security for loan. They agreed that the Respondent will return the money after she finished her problems.

The Respondent defaulted payment hence the Appellant filed this suit to Sikonge Primary court. Through his defense, Sarah Anthony (the Respondent) denied to have borrowed money from the appellant. She narrated that her husband was in prison so the appellant went to the respondent and told her that he has given Tshs, 200,000/= to her Husband in the prison and he told him that her husband has directing him to see his cow. So, she asked Dima to take the Appellant to the cattle yard.

She narrated that afterward Dima came back with a piece of paper which the appellant wrote about taking seven heads of cattle as security for Tshs. 200,000/= which he gave to the Respondent's husband who was in prison. The appellant told her that the money will be paid back by the SAPA the respondent's husband after he comes back from prison.

He narrated that when the respondent's husband came back from prison the Appellant went to the respondent and told the husband of the respondent that he had come to claim his money from the respondent.

She alleged that the when the Appellant went to report the matter to the village leaders. It was revealed that the appellant gave Tshs. 2,000,000/= to one p[erson] called Dima who went with

Emmanuel to the appellant's office and took the money. Upon interrogation Dima told the appellant that the money was given to the Secretary who gave the money to Emmanuel so as to take the money to the Respondent.

Relying on the testimonies adduced by the local leaders who alleged to have been signed the contract between the appellant and the respondent that there was mistaken in recording the amount instead of record Tshs. 2,000,000/= and write Tshs. 200,000/.

He therefore held that appellant had proved his allegation against the Respondent, the trial court awarded the sum of Tshs 2,000,000/= as claimed and cost of Tshs. 150,000/=.

The Respondent was dissatisfied and successfully approached the District Court at Tabora which overruled the trial court's findings but reduced the amount awarded to Tshs 200,000/= on the reason that there was a written contract showing that the appellant advanced loan of Tshs. 200,000/= from the respondent.

The Appellant was aggrieved, he has knocked the doors of this court on the ground that; *in misdirection and non-direction on*

the evidence on record, the Learned Resident Magistrate erroneously reversed the finding of the trial Primary Court (Sic).

Arguing in support of the appeal, it was submitted that the trial court's findings does not bear opinion of the assessors tough they have signed. Hence contravenes Rule 3(1) &(2) of the Magistrates Courts (Primary courts) Judgment of Court) Rules, 1987 GN NO. 2 of 1988).

He also cited the case of **Swalehe Hassan Vs. Amini Ndwata Pc Civil Appeal No. 14 of 2015 High Court at Tabora(unreported)** at Page 2 being guided by the decision of the Court of Appeal of Tanzania in the case of **Agness Saeverini Vaas. Mussa Mdoe(1989) TLR 167 CAT** and the decision of **Mariam Ally Ponda Vs. Kheri Kisinger Hassan (1983) TLR (HC)** and that of **Agnes Malonda Vs. Richard Mhando (1995) TLR 137 (HC).**

The appellant also invited this court to be guided by the evidence on record adduced by the appellant and his witnesses in comparison to that of the respondent had been to the position of the law pertaining to the evidence in primary courts, for that matter the evidence of the appellant carries more weight as compared to that of the respondent that the appellant is entitled to reimbursement of Tshs. 2,000,000/= and not Tshs. 200,000/=

his argument was based on the provision of regulation 6 and 14(1) of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations, 1972 (GN No.66 of 1972).

The appellant submitted that the trial court was wrong to invoke section 100(1) of the law of Evidence Act, Cap 6 R.E. 2009 in reversing the trial primary court findings while primary court courts have their own law regulating different from the evidence Act. He therefore, pray for the court to allow this appeal with costs.

In reply, the respondent argued that the appellant in his submission has argued new grounds which were not filed in this court by way of petition as the law mandatorily requires. He therefore prayed for the court to disregard submission concerning assessors.

Arguing on the ground of appeal relating to the controversy between Tshs. 200,000/= and Tshs. 2,000,000/=. It is submitted that the District Land and Housing Tribunal was correct in its decision. Because, the evidence of claimant/ Appellant herein was so contradicting on his side.

He argued that no one witnessed the handing over of the said amount of money. He also alleged that there was contradictory

evidence regarding the alleged amount of money given to the Respondent.

The respondent contended that the inconsistency and contradictions in the claimant's evidence, right for the District Court not to step into the shoes of the trial court. He therefore prayed for the court to dismiss this appeal with costs.

Having considered the ground of appeal, submission of both parties as well as the record of the lower courts. The central issue for determination is whether the appellant's case was on the balance of probabilities proved.

Since the ground of appeal raised by the appellant based on evaluation of evidence. The established principal of law is that a second appellate court should only be enjoined to deal with questions of law and as such it should not interfere with concurrent findings of facts by the courts below unless the evaluation of evidence was not done properly hence resulting in a miscarriage of justice. See the case of **Amratlal D.M t/a Zanzibar Silk Stores Vs A.H. Jariwala t/a Zanzibar Hotel [1980] TLR 31.**

Upon my perusal on the record of both trial Court and the 1st appellate court. I am settled in mind that there is no clear and direct evidence to prove that the respondent herein received the money claimed by the appellant.

I am holding so because, exhibit P1 and D1 contract which was the base of both trial and 1st appellate court's decision shows that the agreement was entered on 17/6/2018 while the claim filed by the appellant at the trial shows that the respondent took the purported loan of Tshs. 2,000,000/= from the appellant in July 2018.

Also ,the contract which is exhibit P1 and D1 which is the base of the lower courts decision shows that the respondent borrowed from the appellant Tshs. 200,000/= and put security of seven (7) heads of cow as security.

Again, the content on the amount issued to the Respondent differs from the one alleged by the appellant in his claim filed at the trial court. In his claim the appellant alleged that he advanced a loan of Tshs. 2,000,000/= to the respondent while the written contract shows that he only gave the respondent Tshs. 200,000/=

In the light of the above contradiction I find the claim against the respondent have not been to the balance of probability. The appellant has alleged to have advanced Tshs. 2,000,000/= to the respondent but he has failed to give concrete evidence to that effect.

In addition to that, I am so much satisfied that Exhibit "PI / D1", the document is not worth the name a loan agreement or some one's commitment to pay much as the appellant did not counter sign it nor was it as such intended by the parties. There is no wonder the respondent denied it all and, in express terms the lower courts ought to discount it.

Moreover, even when Exhibit "PI" was only for the sake of assumption taken valid and genuine, yet the piece of evidence was unacceptable because it contravened the rule of evidence under provisions of Section 101 of the Evidence Act Cap 6 R.E. 2019 much as if at all, parties were agreed that their agreement had not been reduced into writing.

Basing on the above observation, I find that the claim by the appellant are specific and the law is very clear that specific damage must be pleaded and proved. This position was elaborated in the

Court of Appeal in the case of **Zuberi Augustino Vs. Anicet Mugabe, (1992) TLR 137 at page 139**, said that :-

"It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved."

Similar observations were aired by the Court of Appeal in the case of **Stanbic Bank Tanzania Limited Vs. Abercrombie & Kente (T) Limited, Civil Appeal No. 21 of 2001 (CAT-unreported)**, when cited with approval the holding of Lord Macnaughten in **Bolog Vs. Hutchison (1950) A.C 515** at page 525 on special damages, that:

"... such as the law will not infer from the nature of the act.

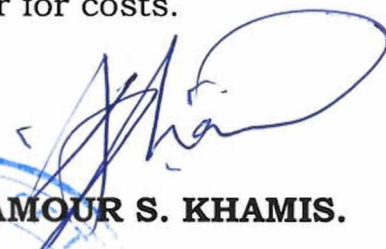
They do not follow in the ordinary course. They are exceptional in their character and, therefore, they must be claimed specifically and proved strictly" (Emphasis supplied)

From the above cited authorities, I am settled in mind that the appellant ought to make sure that his claim was strictly proved. But the evidence on record does not suggest that the claim of the appellant was strictly proved. The appellant pleaded to have lent the respondent Tshs. 2,000,000/= but the evidence on record does not state so and there are contradiction and inconsistency regarding to the amount claimed by the appellant.


It is a cardinal principle that courts of law always decide civil suits on the balance of preponderance of probabilities basing on available evidence. See the case of **Miller Vs Minister of Pensions [1947] 2 ALL ER 372.**

That being said, I find that there is no evidence to support the appellant's allegation of Tshs. 2,000,000/= against the respondent. Accordingly, I hereby quash and set aside judgment and orders of both Trial and 1st appellate court. Appeal is dismissed with no order for costs.

It is so ordered.



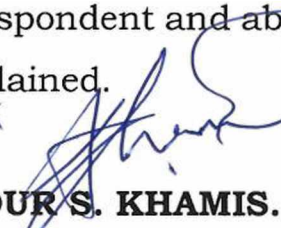
AMOUR S. KHAMIS.
JUDGE
14/12/2022



ORDER

Judgement delivered in Open Court in presence of Mr. Kelvin Kayaga, advocate for the respondent and absence of the appellant.

Right of Appeal is explained.



AMOUR S. KHAMIS.
JUDGE
14/12/2022

