IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 83 of 2022

(Arising from the District Court of Kinondoni at Kinondoni in Civil Appeal No. 72 of 2021. Originating from Civil Case No. 137/2021 at Sinza/Manzese Primary Court)

REHEMA DEGE..... APPELLANT

VERSUS

JOSEPH WILLIAM KESSY..... RESPONDENT

JUDGMENT

11th November & 21st December, 2022

BANZI, J.:

Before the Primary Court of Sinza/Manzese, the Respondent, Joseph William Kessy sued the Appellant, Rehema Dege claiming restoration of his car, Noah with registration No. T743 CFG and Tshs.3,600,000/= being the sum generated from the car he rented to her for four months on consideration of Tshs.30,000/= per day. After receiving the evidence from both sides, the trial court decided in favour of the Appellant whereby, the Respondent was ordered to pay the Appellant Tshs. 2,287,000/= before he was handed over the car in question.

Aggrieved with that decision, the Respondent successfully appealed to the District Court of Kinondoni which quashed and set aside the judgment and the decree of the trial court on the reason that, the claim of

Tshs.2,287,000/= by the Appellant was satisfied via car hire agreement in which the same was deducted from the proceeds of the work that was performed by the said car. The first appellate court further ordered the Appellant to return the car in question to the Respondent. The Appellant was not satisfied with such decision, she lodged the present appeal clothed with five grounds thus;

1. *That, the Magistrate erred in fact for failing to evaluate properly the evidence adduced by the herein Appellant at the Court of first instance.*
2. *That, the trial court erred in law and fact by assuming the presence of the hire of car contract which did not exist.*
3. *That, the trial Magistrate erred in law by shifting the burden of proof from the herein Respondent to Appellant.*
4. *That, the Magistrate erred in fact by assuming that the private car worked for carrying passengers without the proof of route licence.*
5. *That, the Magistrate erred by relying on hearsay evidence.*

At the hearing of the appeal, the Appellant was represented by Mr. Erick Felix Chale, learned Advocate whereas, the Respondent enjoyed the services of Mr. Clinton Kipengele, the learned advocate who was later

replaced by Mr. John Mallya, learned Advocate. With leave of the Court the appeal was disposed by way of written submission.

In his submission, learned counsel for the Appellant stated that, it was the duty of the first appellate court to re-evaluate the evidence as it was held in the case of **Yustus Aidan v. Republic**, Criminal Appeal No. 454 of 2019 CAT (unreported). He further contended that, the first appellate court failed to evaluate properly Exhibit P1 which is the contract of commitment by the parties whereby, the Respondent promised to repay the Appellant Tshs.2,287,000/= that was advanced to him for political campaign during the 2020 General Election and for maintenance of the car that was used for political campaign. However, the Respondent failed to honour the agreement, instead wanted to take the car by force. He further submitted that, the first appellate court erroneously assumed that there was car hire agreement between the Respondent and the Appellant for the latter to use for four months in consideration of payment of Tshs.30,000/= per day because, there was no such agreement from the first instance. If there was such agreement, the Respondent would not have signed the agreement to repay the outstanding debt in instalment as evidenced in Exhibit P1. In that regard, the Respondent failed to prove his claim as held in the case of **Sudi Kaspa v. Paulo Futakamba**, Land Appeal No. 15 of 2021 HC (unreported). He added that, it was an error for the appellant to rely on hearsay evidence of SM2

and SM3 about the car being working for gain under car hire agreement while such evidence has no value as it was stated in the case of **Jadili Muhumbi v. Republic**, Criminal Appeal No. 229 of 2021 CAT (unreported). He finally prayed for the appeal to be allowed with costs by quashing the decision of the District Court and upholding the decision of the trial court.

In reply, learned counsel for the Respondent contended that, there was car hire oral agreement between the Respondent and the Appellant for the Appellant to use it to carry passengers for four months for payment of Tshs.30,000/= per day which would be used to pay his loan and other costs which the Appellant had incurred for the car. This is supported by the evidence of SM2 and SM3 who participated in the agreements between the parties and they had personal knowledge on the said agreements because they were directly involved. Also, the Appellant paid Tshs.125,000/= to TRA so as to use the car for commercial activities for six months. He further submitted that, the Appellant alleges that, the Respondent borrowed Tshs.1,500,000/= from the Appellant for political campaign to be paid by 30th October, 2020, failure of which, the Appellant should take the car in satisfaction of the debt. However, the Appellant failed to prove the same as required by law. In that regard, he prayed for the appeal to be dismissed with costs for want of merit

In rejoinder, apart from reiterating his submission in chief, learned counsel for the Appellant further submitted that, SM2 and SM3 never participated in the agreement therefore their evidence based on hearsay. He also argued that, the Appellant paid Tshs.125,000/= to TRA in order to change the use of the car from private to commercial, with the aim that, the car should not stay idle at home because she was free to use it in the manner it deemed fit to her. However, the car never worked for any commercial purpose to carry passengers. According to him, the Respondent failed to prove if the car was used to carry passengers. He reiterated his prayer for the appeal to be allowed with costs.

Having examined the submissions by both parties and the petition of appeal it is clear that, the appeal at hand comprises of matters of facts. The principle on matters of fact on second appeal is well settled that, a court of second appeal will not routinely interfere with the findings of the two courts below except where there has been non-direction or a misapprehension of evidence causing injustice or violation of some principles of law or procedure. See the case of **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores v A. H. Jariwalla t/a Zanzibar Hotel** [1980] TLR 31 and **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149.

In the matter at hand, the trial court after considering the evidence of both sides decided in favour of the Appellant. On the other hand, the first appellate court reversed the decision of the trial court. In these premises, the main issue to be determined by this court is whether the first appellate court was justified to reverse the decision of the trial court.

As stipulated under section 3(2)(b) of the Evidence Act [Cap 6 R.E. 2022] that, the proof of a fact in civil case is always based on the balance of probability. It is also a settled principle that a party with heavier evidence is one who must win. See the case of **Hemed Said v. Mohamed Mbilu** [1984] TLR 113.

In the matter at hand, the Respondent in his testimony claimed that in November 2020, he handed over his car to the Appellant who was his partner in the campaign for purpose of repairing and using it for commercial purpose in order to refund the amount paid for repairing. According to him, the Appellant used Tshs.2,287,000/= for repairing the car in question. It was also his testimony that, the Appellant told him that, she was intending to get Tshs.30,000/= per day. The Respondent's wife who testified as SM2 supported the assertion by the Respondent about the Appellant being handed over the car for repairing and use for commercial purpose in order to refund the amount used for repairing and finally she should return their car. On the contrary, SM2 and SM3 said

nothing concerning existence of agreement between the Respondent and Appellant about the car to generate Tshs.30,000/= per day as concluded by the first appellate court in its judgment.

According to the evidence of the Appellant, the Respondent borrowed Tshs.1,500,000/= from her on a promise to repay within two weeks and if he didn't pay until 30/10/2020, he will hand over to her the car in question after the campaign. Things did not go as planned and the car was impaired before the end of campaign that made the duo to come into agreement for the Appellant to repair it. According to the Appellant, she repaired it for Tshs.2,287,000/=. The appellant claimed that the car had never worked as it was planned because of mechanical defects and had no licence for commercial purpose. After a long dialogue, on 12/04/2021 the duo entered into agreement and the Respondent promised to pay the Appellant TZS. 2,287,000/= in three instalments between 01/05/2021 and 30/08/2021 as evidence in Exhibit P1.

The Respondent's assertion about claiming Tshs.3,600,000/= was mere words which were not backed up with any evidence proving the same. If that claim was genuine, it was expected to be reflected in their agreement they entered on 12/04/2021 (Exhibit P1) for repayment of costs incurred by the Appellant in repairing the car. If the said car by any chance generated a certain amount as claimed by the Respondent, it was

expected to be revealed in their agreement as a setoff for the costs she incurred. The agreement in question was executed in the presence of five witnesses. The Respondent told the trial court that he was convinced by the elders to enter into that agreement. However, he did not state whether he was forced or threatened to enter into that agreement to repay the Appellant. Besides, the Respondent from the beginning acknowledge that, the Appellant used Tshs.2,287,000/= to repair the car in question. Therefore, exhibit P1 shows that the Respondent freely and voluntarily entered into such agreement to repay the Appellant Tshs.2,287,000/=. Therefore, this was the agreement which was supposed to be performed accordingly. In the case of **Simon Kichele Chacha v. Aveline M. Kilawe** (Civil Appeal No. 160 of 2018) [2021] TZCA 43 the Court of Appeal stated that:

> *"It is settled law that parties are bound by the agreement they freely entered into and this is the cardinal principle of the law of contract"*

Also, in the case of **Joseph F. Mbwiliza v. Kobwa Mohamed Lyeeselo Msukuma and Others** (Civil Appeal No. 227 of 2019) [2022] TZCA 699 the Court of Appeal being faced with the controversy between the agreement that was written and the other that was entered orally, it held that:

"Once parties to a contract reduce their agreement into writing, the written agreement prevails in terms of section 101 of the Tanzania Evidence Act..."

From the decisions cited above, it is without doubt that the Respondent freely agreed to pay the Appellant her money and put that agreement into writing. Therefore, it is unbecoming for the Respondent to say that it was the Appellant who was supposed to pay him 3,600,000/=. From the findings above, I am satisfied that the Respondent was aware of the money he was supposed to pay the Appellant and he knew that he had not paid it. For that reasons, it is the finding of this Court that, the first appellant court was not justified to conclude that the evidence of the Respondent carried weight compared to the evidence of the Appellant.

That being said, I find the appeal with merit and I hereby allow it with costs. The resultant, I quash and set aside the judgment and the decree of the District Court of Kinondoni at Kinondoni and uphold the findings of the trial court.

THE HIGH COURT OF TANZANIA

I. K. BANZI
JUDGE
21/12/2022