]IN THE HIGH COURT OF TANZANIA

(MOROGORO SUB-REGISTRY)

AT MOROGORO

CIVIL APPEAL NO. 05 OF 2022

(Arising from the decision of the District Court of Kilosa, at Kilosa in Civil Appeal No. 24 of 2021, Originating from Civil Case No. 31 of 2020, of the Ruaha K11 Primary Court)

LUGANO SIMON MWANYALU.....APPELLANT

VERSUS

ROCKY RAPHAEL KIMBAWA.....RESPONDENT

JUDGMENT

30th Nov, 2022

CHABA, J.

This appeal is against the decision of the District Court of Kilosa, at Kilosa in Civil Appeal No. 24 of 2021 delivered on the 21st January, 2022. At first, the appellant, Lugano Simon Mwanyalu successfully instituted a civil matter against the respondent, Rocky Raphael Kimbawa before the Ruaha K11 Primary Court claiming a total of TZS. 29,390,000/= being money that he lent him on diverse dates. After a full trial, the trial Court ruled that, the appellant had proved his claims on balance of probability

and therefore, it ordered the defendant/respondent herein to pay the appellant a total of TZS. 23,340,000/=.

Aggrieved, the respondent successfully appealed to the District Court of Kilosa, at Kilosa wherein his appeal was allowed and the decision of the trial Court was quashed. However, the appellant, Lugano Simon Mwanyalu was unhappy and therefore he filed the instant petition of appeal on the 10th February, 2022 intending to challenge the decision of the District Court of Kilosa, at Kilosa. His petition of appeal comprised of four (4) grounds of appeal as hereunder:

1. That, the Honourable District Magistrate erred in law and facts by failing to evaluate properly evidence on record and failure to appreciate the appellant's evidence, hence arrived at wrong conclusion.
2. That, the Honourable District Magistrate erred in law and facts to expunge the Exhibit P.1 and interfering the finding of the Primary Court without any justifiable reasons.
3. That, the Honourable District Magistrate erred in law and facts by failing to appreciate the proper evidence of the appellant as testified before the Primary Court and holding that the respondent is not liable to pay the loan that he borrowed from the appellant.
4. That, the Honourable District Magistrate erred in law and facts to hold in favour of the respondent while in fact the appellant proved his case on balance of probabilities and successfully showed that the respondent

borrowed the money amounting to TSZ. 23,340,000/=, and has never paid back the money to the appellant.

When the appeal was called on for hearing, both parties appeared in persons, and unrepresented. The appellant argued generally and submitted that the District Court did not assign reasons as to why it vacated the decision of the trial Court. He therefore, prayed the Court to scrutinize the lower Courts records and come up with its own finding.

In reply, the respondent submitted that, the appellant's claims are not genuine because up to the date he filed the case it is uncertain as to what amount exactly the respondent received from the appellant.

As for the second ground of appeal, the respondent contented that, the exhibit tendered before the Court do not show that he owed money from the appellant. He further highlighted that, the same has no signature of the appellant himself or any witness showing that the respondent took money from the appellant.

The respondent further stated that, he recalls that he only took TZS. 6,050,000/= from the appellant and paid a total of TSZ. 9,000,000/= including the interest accrued from the loan.

He concluded by insisting that, he was denying the amount claimed by the appellant as there is no clear explanations from the appellant on

how he arrived at such amounts of TZS. 29,000,000/=, and prayed for the Court to investigate on the matter and come up with the clear answer.

In re-joinder, the appellant elaborated that, the respondent had a tendency of borrowing money from him without documentation, but one day the two met and discussed in details where everything was narrated in respect of the money, he used to take from him (the appellant) as loan and after the calculations were made / done, the outstanding loan that remained unpaid showed that its total amount was TSZ. 29,000,000/=.

Having considered the grounds of appeal, and upon painstakingly gone through the lower Court records and the rival submissions advanced by the parties, I am now in a position to determine the appeal. In so doing, I will determine the grounds of appeal as presented, save for grounds 1, 3, and 4 where the same will be determined jointly for a reason that all revolves around one issue of evaluation of the evidence by the trial Court.

To begin with, I will start with the 2nd ground as to whether the expungement of Exhibit P.1 was legally justified. According to the Court record, the learned Resident Magistrate when expunging the said Exhibit P.1 as shown on page 4 of the typed copy of judgment, he stated that: -

"... The trial court after determination of preliminary objection raised by the appellant regarding Exhibit P.1 admitted the said Exhibit but the records does not show if the contents of Exhibit P.1 were read over before parties after admission ....with regards to the above observation, this court by taking into consideration the principle of overriding objective as per Yakobo Magoiga Gichere Vs. Penina Yusuph, Civil Appeal No. 53 of 2017, C.A (unreported), the proper procedure is to expunge them ....Therefore, the Exhibit which was admitted by the court as Exhibit P.1 is hereby expunged from the record".

From the above except of the first appellate Court, it is clear that the reasons that led to the expungement of Exhibit P.1 is related to the failure by the Primary Court to follow the procedural requirement in respect of reading over the same to the defendant (the respondent).

I wish to point out here that, it is an established principle of law that in admission of a documentary evidence, four stages must be observed, that the document has to be identified, cleared and admitted and after it has been admitted, its contents must be read out to the parties. **(See: Mabula Mboje & Others Vs. Republic** (Criminal Appeal 557 of 2016) [2020] TZCA 1740 (20 August 2020); **Bernard Thobias Joseph & Another Vs. Republic** (Criminal Appeal 414 of 2018[2021] TZCA 113

(14 April 2021); **Evarist Nyamtemba Vs. Republic** (Criminal Appeal 196 of 2020) [2021] TZCA 294 (12 July 2021); **Rashid Kazimoto & Another Vs. Republic** (Criminal Appeal 458 of 2016) [2016] TZCA 464 (06 December 2019); (tanzlii.org.tz.) (All unreported). In **Bulungu Nzungu Vs. Republic** (Criminal Appeal 39 of 2018) [2022] TZCA 454 (21 July 2022); (tanzlii.org.tz.) (unreported), the CAT had the following to say: -

> *"It is now a well-established principle in the law of evidence as applicable in trial of cases, both civil and criminal, that generally once a document is admitted in evidence after clearance by the person against whom it is tendered, it must be read over to that person ".*

It has generally been settled view that, each party to a trial be it criminal or civil, must in principle have the opportunity to have knowledge of and comment on all evidence adduced or observations filed or made with a view to influencing the court's decision.

In the case at hand, the document in contention was a loan agreement dated 5/06/2017. It is not disputed that the same was admitted and marked as Exhibit P.1, but it was not read out in Court after being admitted. In other words, its contents were therefore not made

aware to the parties, in particular the respondent and that is a serious irregularity. The respondent was not even afforded an opportunity to cross examine the appellant on that exhibit. Applying the principle set out in the decision of the CAT in **Bulungu Nzungu's** case (supra), the first appellate Court was correct to expunge from the record the Exhibit P.1 basing on the above legal requirement. I thus, confirm the decision of the first appellate Court on this facet. In other words, since the contents of Exhibit P.1 were not read to the parties in Court, the same is hereby expunged from the Court record. Having so found, I find no merit in this ground. I thus, dismiss it.]

After expunging Exhibit P.1, what follows is to examine if the remaining evidence suffices to support the decision reached by the trial Court. In examining the same, I will also address the 1st, 3rd and 4th grounds altogether.

It is apparent that, the complaint put forward by the appellant as per grounds 1, 3 and 4, is that the case was proved to the required standard as stated by the trial Court. Thus, the first appellate Court erred in law and fact when it failed to uphold the decision of the trial Court. In the instant case, it was not disputed that, the respondent borrowed some money from the appellant. However, their major point of departure is, how the amount claimed by the appellant originated and increased to the

tune of TZS. 29,360,000/= without plausible explanations. From the records of the trial Court, the respondent submitted that, he borrowed from the appellant a total sum of TZS. 9,000,000/- and repaid the whole debt. The appellant on his part, is claiming he lent him a total sum of TZS. 29,360,000/= to the respondent who only repaid a sum of TZS. 6,000,000/=.

In determining the issue at hand, I wish to point out that, it is common knowledge that the standard of proof in civil cases is on the balance of probability, and that he who alleges must prove. Unlike in criminal cases, civil claims are always proved on the preponderance of probability. In civil cases, the winner is decided based on the weight of evidence. Therefore, a party with heavier evidence will always have a good case against a party whose evidence is flimsy. Also, see the case of **Hemed Said Vs. Mohamed Mbilu [1984] TLR 113** on the principle that, the person whose weight is heavier must win.

Having revisited the testimony given by the appellant when he was adducing his evidence before the trial Court, I have no hesitation whatsoever to make a finding that he was not able to adduce sufficient evidence, on balance of probabilities, that he lent the claimed amount of money to the respondent. Reverting to the trial Court records, in particular

from the handwritten judgment of the Primary Court, the same speaks for itself. I quote: -

> *".....Aliendelea kuchukua hela bila kurudisha hadi tarehe 5/6/2012, akaniita nyumbani kwake kwa kuwa deni lilishakuwa kubwa hadi kufikia shilingi 29,390,000/= ....."*.

From the above piece of evidence, I am of the view that, the Hon. trial Magistrate failed to make proper evaluation and analysis of both testimonial and documentary evidence as there is no evidence as to how the said debt borrowed and afterward increased and made a total of TZS. 29,390,000/=. On reviewing the evidence adduced before the trial Court, the same are silent on how the said figure was calculated and abruptly arrived at TSZ. 29,390,000/=.

In my considered opinion, it was wrong for the trial Court to assume that the appellant is indebted to the respondent as the origin of the alleged amount was not proved to the required standards. Placing reliance under the provisions of sections 110 and 111 of the Evidence Act [Cap.6 R. E, of 2019] and the case of **Mohamed Vs. Mohamed (Civil Appeal 31 of 2000) [2005] TZCA 65 (19 October 2005);** (tanzlii.org.tz.) (unreported), I am of the view that, while the law requires that the ones who alleges must prove his allegations, in this appeal, the total sum of

TZS. 23,340,000/= which appears to remain after the respondent had paid the sum of TZS. 6,000,000/= as claimed by the appellant, was not proved against the respondent, for one reason that, from the outset, the outstanding debt was not proved as to how it was bring about and abruptly increased to the amount claimed.

For the above reasons, it is my holding that the appellant herein, who was the plaintiff before the trial Court, failed to prove his case on the basis of the standards required by the law. On the other hand, the respondent's AQ evidence as gleaned from the records, was consistent, coherent and well proved.

In the final analysis, I am satisfied that the instant appeal is without merit and the claim of TZS. 29,360,000/= was not substantiated in accordance with the legal requirements. Indeed, there is no basis of faulting the judgment and decree of the first appellate Court.

Accordingly, I dismiss the appeal for want of strict proof with no order as to costs. **It so order.**

DATED at **MOROGORO** this 30th day of November, 2022.

M. J. Chaba

Judge

30/11/2022