

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA

CONSOLIDATED PC. CIVIL APPEALS NO. 43 and 44 OF 2022

*(Arising from District Court of Nyamagana Civil Appeal No. 35 of 2021, Originating from Mkuyuni
Primary Court Civil Case No. 89 of 2021)*

KIKUNDI CHA MWANGA (SHALILOTE KAIZA) APPELANT

VERSUS

CHRISTINA BONIPHACE RESPONDENT

JUDGMENT

8th December, 2022, & 30th March, 2023.

ITEMBA, J.

This is a cross appeal whereas both parties are aggrieved with the decision emanating from Civil Case No. 35 of 2021 in the District Court of Nyamagana. For ease of reference Kikundi cha Mwanga (Shalilote Kaiza) who has filed an appeal No. 43/2022 will be referred as Kikundi cha Mwanga and Christina Boniphace who is the appellant in civil appeal No. 44/2022 will be referred to as Christina.

Facts leading to this appeal are that; Kikundi cha Mwanga was a group of 32 women who in December 2015, decided to contribute money, with the aim of issuance of loans among each other, where each member will be given a share of profit according to their contribution. That, the group was duly registered and Christina was appointed a treasurer of the group.

It follows that, at the end of the year Christina as a treasurer could not present the money to the members in the expected amount based on the calculations. That, Christina was supposed to have in cash money amount to TZS 6,140,000/=. That, when the chair asked if the calculations were correct Christina agreed that it was correct but she only had TZS 3,120,000/=. That, following that report, the members were highly disappointed caused a lot of chaos and asked Christina to find a way to pay back the money. That, Christina admitted that she will pay back the whole missing amount within a week. The husband of Christina was informed of the missing money by Kikundi cha Mwanga and agreed to pay TZS 100,000 per month, but the chair explained that it is very small amount. It is also in evidence that, Christina managed to pay only TZS 580,000/= following her arrest and detention at Butimba prison. That she also used her share of the profit from Kikundi cha Mwanga to pay some of the debt. That, Kikundi cha Mwanga decided to sue Christina on the remaining amount of TZS 2,240,000/=. The Primary Court issued a decision in favour of Kikundi cha Mwanga and Christina was ordered to pay back the money which she owes Kikundi cha Mwanga. Christina appealed against that decision at the District Court of Nyamagana. The District Court issued a judgment in favor of the respondent but did not

make any orders of costs. Following this decision this cross appeal was filed in this court by both parties.

Kikundi cha Mwanga have advanced the following three grounds of appeal.

- 1. That, the 1st appellate court erred in law and facts for failure to take into account exhibit tendered by the respondent/Appellant at the Primary Court shown the Appellant/Respondent paid the group part monies Tshs 580,000/= which had direct connection with the matter at hand in the trial court.*
- 2. That, the 1st appellate court erred in law and facts rely on calculations done on how getting Tshs 6,140,000/=.*
- 3. That, the 1st appellate court erred in the law and in fact to decide that no doubt the respondent appellant have failed to prove her case on balance of probabilities.*

Meanwhile, Christina, filed only one ground to wit: -

- 1. The trial court erred in law by failing to issue an order of costs to the appellant without stating any reasons thereof.*

At the hearing Christina was represented by Mr. Yuda Kavugushi learned counsel while Kikundi cha Mwanga was represented by Shalilote Kaiza who is the guardian of the group. The appeal was argued through written submissions. Kikundi cha Mwanga argued the 1st and 3rd grounds jointly and dropped the 2nd ground of appeal.

Generally, Kikundi cha Mwanga submitted that at the trial Christina had admitted the claims against her and agreed to pay and all witnesses testified to that effect that is why the trial court ruled in favor of Kikundi cha Mwanga and found that the case was proved on the balance of probability.

In respect of civil appeal no. 44 of 2022, the counsel for Christina Boniface argued the single ground of appeal that the District Court of Nyamagana allowed the appeal by Christina Boniface but it did not grant her costs. The learned counsel insisted that it is only in disputes related to labour, probate, matrimonial or the issues which the court has raised *suo motto*, where the court do not grant costs to the winning party. That in all other disputes costs have to be awarded, if not, then there must be reasons assigned. He relied in the decision of **Bahati Moshi Masabile t/a Ndono Filling Station v Camel Oil (T)** Civil Appeal No. 216 of 2018 High Court Dar es salaam. He stated further that, as Christina had incurred costs to prepare the said appeal it was just for the District court to award them costs.

Replying to the appeal by Christina, they stated that granting of costs is discretionary to the trial court and it depended on the circumstances of the case.

On his part, replying to the appeal by Kikundi cha Mwanga, Mr. Kavugushi argued that, throughout the records there is nowhere indicating that Christina admitted to be indebted TZS 2,240,000/=. He added that there is no such evidence in the records showing that on 17th and 24th December 2016 and on 30th of January 2017 Christina has admitted to pay back the same amount through signing and affixing her thumbprint. That, the first appellate court was justified in dismissing the appeal because the case was not proved in the balance of probability as required by the Magistrate Court rules GN no 66 of 1972. He added that, it was not clear how the members raised the said TZS 2,240,000/= and even at page 10 of proceedings SM1 stated that '*hawana mahesabu*' meaning that they did not have supportive calculations to prove the claims. That, it is not known as to when did the members started to contribute, how much was the contribution and for how long? That the Kikundi cha Mwanga claimed to have exhibits but they did not produce any. That, on the other side, based on page 7 of the proceedings, Christina has been clear in explanation and calculations.

Based on the rival arguments between the parties, the issue is whether the appeals have merit.

Starting with appeal by Christina, I have keenly considered the arguments by Mr. Kavugushi learned counsel against the evidence in

record and I have observed the following. Basically, the learned counsel is challenging the weight of the evidence by Kikundi cha Mwanga. It is trite law that oral evidence can be relied in proving facts before the court as long as it remains direct. Sections 61 and 62 of the evidence Act provides in that respect:

61. All facts, except the contents of documents, may be proved by oral evidence. Oral evidence must be direct.

62.-(1) Oral evidence must, in all cases whatever, be direct; that is to say-

(a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

(b) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

(c) if it refers to a fact which could be perceived by any other sense, or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

(d) if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion or, as the case may be, who holds it on those grounds:’

It is also trite law that the standard of proof in civil cases is on balance of probability in terms of **Section 3(2) of the evidence Act** which states:

'A fact is said to be proved when-

(a) n/a

(b) in civil matters, including matrimonial causes and matters, its existence is established by a preponderance of probability.'

In the case of **Jason S. Rweikiza v. Noratus R. Nkwama Civil Appeal No. 305 of 2020 Bukoba** (Court of Appeal Tanzania) when quoting with approval the case of **Miller v. Minister of Pension and it had this to say:**

*'This Court has always sought inspiration is the statement by Lord Denning in **Miller v. Minister of Pensions** [1937] 2 All. ER 372 in which he states that: "If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in civil case. That degree is well settled. It must carry a reasonable*

degree of probability, but not so high as required in criminal case. If the evidence is such that the tribunal can say- We think it is more probable than not, the burden is discharged, but, if the probabilities are equal, it is not..."

This means the Court has the duty to assess the parties' evidence in its totality and decide on balance of preponderance based on the weight of evidence of each party.

As for the evidence regarding timing of the contributions, SM1 has explained that they formed the group in December 2015 and started contributions in 2016 at a rate of TZS 2,000 per month and there was no limitation to the maximum amount. Much as the witness from Kikundi cha Mwangaza did not bring any documents their evidence was consistent on what happened. I agree that documentary evidence is valuable but if there is oral evidence in respect of the same facts then documentary evidence is there to supplement the oral evidence and not to substitute it. It means therefore, absence of documentary evidence does not necessarily mean that the alleged fact has not been proved. The court has the duty to assess the oral evidence and credibility of witnesses and make its decision thereof.

The 1st appellate court's decision in allowing the appeal was that the calculations were not clear on how the group raised the said amount of money and there was no supporting evidence to that effect.

I find that, as the Primary Court rightfully made its decision even in the absence of the supporting documentary evidence, there were 5 witnesses who were all members of the group. As said, their testimonies were consistent that Christina was their treasurer, that the amount expected was missing by TZS 2,240,000/= and Christina had agreed to pay back and in fact, she managed to pay back TZS 580,000/=, she started to pay by foregoing her dividends and also by offering to pay TZS 100,000/= per month by being assisted by her husband only that the amount appeared to be too small to settle the debt. Christina could not do this if she believed that she owes nothing to the group. It is also in evidence that Christina agreed before the street chair that she will pay back the money as it was lost under superstitious circumstances also known as '*chuma ulete*'.

The first appellate court was also of the view that contributing TZS 2,000, will not amount to 6,140,000/= in fifty weeks. I think this conclusion is incorrect because the total amount in fifty weeks will depend on other factors. As the witnesses mentioned that TZS 2,000/= was just the starting point any member could contribute any higher amount depending on her capacity. To me, as there is no evidence to the contrary, under the circumstances it was quite possible for the group to raise Tanzania Shillings 6,140,000/= in a year as TZS 2,000/= times 52 weeks, times average of 30 members amounts to 3,120,000/=. This is the

minimum estimated amount if each member pays 2,000/= but we are informed that there was no limitation in maximum amount. Therefore, a total amount cannot be calculated based on TZS 2,000/=.

There were 4 issues raised by the trial court *whether the defendant was the treasurer, whether she had a duty to keep the group's money, whether she was supposed to return the money and she did not and whether she should pay back TZS 2,240,000/=*. All the issues raised by the trial court were answered in affirmative that based on the evidence adduced by SM1 SM2 SM3 SM4 and SM5 who were all the group members, the case by Kikundi cha Mwanga was established. All these witnesses were competent and were entitled to credence unless there are good and cogent reasons to the contrary. See: **Goodluck Kyando v Republic** [2006] TLR 363 and **Simon s/o Shauri Awaki@ Dawi v R** Criminal Appeal No. 62 Of 2020, CAT. In the premises, there are no good reasons in the records to discredit the said five witnesses.

The trial court was very categorical that although there were no exhibits or documents brought to court by the Kikundi cha Mwanga but the evidence of all witnesses was corroborating each other in that (i) that, Christina was the Treasurer of the Kikundi cha Mwanga, and there was an agreement for the members to contribute money and Christina to keep it. (ii) That, after the calculations were made, Christina admitted to have less

money than expected (iii) That, she asked the members to distribute the available money and she will pay the rest of the money later.

Based on the above, I find that Kikundi cha Mwanga managed to establish their claims in the required standard of balance of probability. Therefore, the appeal by Kikundi cha Mwanga is allowed and the decision of the first appellate court is hereby set aside.

On the contrary, Christina's appeal as regards costs automatically fails as there are no basis for awarding him costs at this stage as prayed for in the cross appeal.

Finally, the appeal filed by Kikundi cha Mwanga is allowed while the appeal by Christina Boniphace is hereby dismissed with costs.

It is so ordered.

Right of Appeal explained.

DATED at **MWANZA** this 30th day of March, 2023.


J. ITEMBA
JUDGE



Judgment delivered in chamber in the presence of Mr. Yuda Kavugushi counsel for Ms. Christina Boniphace, Ms. Shilole Kaiza for Kikundi cha Mwanga and Ms. Gladys RMA.

A handwritten signature in blue ink, appearing to read 'L. J. Itemba', is centered on the page.

L. J. ITEMBA
JUDGE
30.3.2023.