

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
ARUSHA SUB REGISTRY
AT ARUSHA**

PC. CIVIL APPEAL NO. 24 OF 2023

*(Originating from Kisongo Primary Court Civil Case No. 17 of 2022 and arising from
the Monduli District Court, Civil Application No. 02 of 2023)*

RICHARD MUNISIAPPELLANT

VERSUS

PILI MOHAMED RESPONDENT

JUDGMENT

24th Oct, 2023 & 17th January, 2024

MWASEBA, J.

The Appellant herein sued the respondent before the Primary Court of Kisongo (herein to be referred to as the trial court) claiming for Tshs. 5,500,000/= that he advanced to the Respondent as a loan in different occasions in year 2019 for the purpose of establishing a business. Subsequently, the respondent declined to repay the said loan to the Appellant.

The Appellant claimed that, he extended a loan to the respondent out of an intimacy relationship as they were lovers. However, after her business took off, she refused to repay back the loan she secured. This



act prompted the Appellant to institute a suit before the trial primary court seeking to recover the said loan.

In her defence, the Respondent averred that, she had the intimacy relationship with the appellant which later on turned into sour as she became sick and underwent a surgery to which the Appellant refused to assist her in paying treatment costs and or even visiting her in hospital when she was admitted. She further claimed that, in establishing her business she secured a loan from bank and her children also contributed some money to her, hence, she managed to establish her own business and totally denied to have taken a loan from the Appellant. The trial court decided in favour of the Respondent that the Appellant was unable to prove his claim against the Respondent on the required standard.

Being aggrieved by the trial court's decision, the Appellant unsuccessfully appealed to the district court of Monduli at Monduli (the 1st appellate court) in Civil Appeal No. 02 of 2023. He then preferred a second appeal to this court on the following grounds: -

- 1) That, the trial magistrate erred in law and fact by not properly weighing the balance of evidence/proof of the respondent that she did not prove her case on the balance of probabilities as requirement in a civil case.*



- 2) *That the trial magistrate erred in law and fact by failing to evaluate the evidence adduced by the parties and hence arrived to an erroneous decision.*
- 3) *That trial magistrate erred in law and fact by not putting in consideration the evidence adduced by the appellant and hence arrived to a wrong decision in favour of the respondent.*
- 4) *The trial magistrate erred in law and fact by wrongly considering the mere allegations of the respondent which were not backed up by any evidences whatsoever.*

Hearing of appeal was by way of written submissions and parties complied to the submissions schedule save for the rejoinder submission. As a matter of legal representation, the Appellant was duly represented by advocate Mwamini B. Kilongola while the Respondent enjoyed the legal service of Advocate Vicent Stewart Nyange.

Arguing in support of the appeal, the Appellant's counsel submitted on the 1st and 4th grounds of appeal jointly by faulting the trial court for not weighing the balance of evidence particularly when she claimed that, the money used in starting her business she obtained from her children, and also secured a loan. He said there is no any loan agreement that was tendered to support her claim. For this, reference was made to **Section 110(1) and 111 of the evidence Act**, Cap 6 R.E 2019 and



the case of **Berelia Karangai v. Asteria Nyalwambwa**, Civil Appeal No 237 of 2017 (CAT).

In respect of the 2nd and 3rd grounds of appeal, the Appellant's counsel stated that, there was no proper evaluation of evidence by the trial court hence erroneous decision was reached. At the trial court the Appellant explained that he loaned the respondent a total of Tshs. 5,500,000/= in two instalments that is Tshs. 2,500,000/= for the first instalment and Tshs. 3,000,000/= for the second instalment. However, the subordinate courts erred to rule out that the Appellant was not sure of the exact amount of loan he extended to the Respondent.

Ms. Mwamini stated further that due to the relationship that existed between the Appellant and the Respondent, it was not imaginable that there was a need to keep into writing or call witness whenever he extended a hand of help to his lover. So, the only Appellant's witness before the trial court evidenced on the Appellant's effort in assisting his lover to open a shop and sale a local beer. The Appellant prays that the appeal be allowed and referred this court to the case of **Julius Josephat v. Republic**, Criminal Appeal No. 03 of 2017 where the Court of Appeal held that;



"...it is the practice that in second appeal, the court should very sparingly depart from the concurrent findings of fact by the trial court and the first appellate court. In exceptional circumstances, it may nevertheless interfere as such only when it is clearly shown that there has been a misapprehension of the evidence, a miscarriage of justice or violation of some principles of the law or procedure by the courts below.

Contesting the Appeal, Mr. Nyange stated in the foremost that exhibits do not form part of submission. He urged this court to expunge the exhibits attached in the Appellant's submission in chief and supported his arguments with the case of **Abubakar Rashidi Ismail v. Ahmed Salum Rashid Katungunya & another**, Civil Application No. 347/17 of 2022.

Responding the 1st and 4th grounds of appeal, the counsel for the Respondent argued that, before the trial court, the Appellant instituted a claim against the respondent for recovery of Tshs. 5,590,000/=.

However, by virtual of **Section 110 of the Evidence Act**, he who alleges must prove. It is the Appellant who alleges thus, the evidential burden of proof can never be shifted to the Respondent herein. He referred this court to the case of **Geita Gold Mine Ltd & another v.**



Ignas Athanas, Civil Appeal No 227 of 2017 CAT at Mwanza to substantiate his argument.

Replying to the 2nd and 3rd grounds of appeal, it was the Respondent's counsel assertion that, before the trial court the Appellant had not presented any proof to substantiate his claim but rather used love as a reason to substantiate his claim. He argued further that the standard of proof in Civil Case is on balance of probabilities and the Appellant failed to prove his case on the required standard. He bolstered his argument with the case of **Bakari Mhando Swanga v. Mzee Mohamed Bakaru Shelukindo and others**, Civil Appeal No. 388 of 2019 CAT (Tanzlii). Basing on the submission made, he prays that the appeal be dismissed with costs.

I have considered the rival submissions and the record before this court, the issue for consideration is whether the Appellant managed to prove its claim on the balance of probabilities to warrant the award of Tshs 5,500,000/= as the loan extended to the Respondent.

Before going to the merit of the appeal, I find it useful in a nut shell to first determine the issue raised by the counsel for the respondent in his submission concerning the attachments in the Appellant's submission. I am in agreement with the Respondent's counsel that



submission is not evidence or are not intended to introduce evidence in it rather it is expected for the same to contain arguments on the applicable law. Thus, something like a medical prescription (it is faint) which is annexed to the appellants submission in chief is hereby expunged from the record.

Further, while I appreciate the submissions made by the learned counsels for both parties, I wish to make it clear that this matter being originated from the Primary Court, the **Law of Evidence Act**, Cap 6 R.E 2019 is not applicable. The Law applicable with regards to the evidence in Primary court is **The Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations**, 1964.

Reverting to the merit of the application before this court, it was the Appellant's claim that he extended a loan to the respondent for starting a business. The respondent denied the allegation and stated that she got the money to start her business from her children and a loan that she secured from bank. It was the appellant's complaints that the respondent ought to prove how she got the said loan for starting her business.

It is a common knowledge that, whoever makes a claim against another in a civil case bears the evidential burden to prove his claim.

This is well stipulated under **Regulation 1 (2) of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations** (Supra) that:

"Where a person makes a claim against another in a civil case, the claimant must prove all the facts necessary to establish the claim unless the other party (that is the defendant) admits the claim."

That being the stand of the law, it was the duty of the Appellant at both the trial court to prove on the amount of money claimed against the respondent. The said proof has to go hand in hand with the amount claimed in the pleadings that was used to initiate the claim before the trial court. It was the appellant's claim at the trial court that:

"Mnamo mwaka 2019 huko sabasaba, Monduli nilikuwa na mahusiano na mdaiwa, Nilimkopesha mdaiwa kiasi cha fedha Taslim Tshs 5,590,000/= kwa nyakati tofauti tofauti kwaajili ya biashara zake. Baada ya biashara zake kukua nilimfuata anirudishie fedha zangu alikataa. Hivyo namdai mdaiwa anirudishie fedha zangu kiasi cha Ts 5,590,000/=."

In proving his claim, the appellant stated that while extending the said loan to the Respondent, they were only two of them. There is no any evidence to corroborate his claim. The respondent disputed the allegation and stated that she terminated their love relationship as when




she was sick, the appellant did not bother her and when she recovered, he wanted to continue with their intimacy. The respondent was not ready hence the appellant started claiming that he extended the loan to her. Due to this piece of evidence, I concur with the counsel for the respondent that the weight of the respondent's evidence is heavier than the weight of the appellant's evidence. See **Regulation 6 of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations.**

Based on the foregoing, I am of the settled mind that the first appellate court cannot be faulted to uphold the trial court's decision. In the final analysis, I find no merit in the appeal and, I accordingly, dismiss it with costs.

DATED and **DELIVERED** at **ARUSHA** this 17th day of January, 2024,




N.R. MWASEBA

JUDGE