IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

CIVIL APPEAL NO.6 OF 2022

(Originating from Civil Case No. 19 of 2020 Resident Magistrate's Court of Bukoba)

JACKLINE MAJID..... APPELANT

VERSUS

ABDUL MBARAKA ALLY MUKAYU..... RESPONDENT

JUDGMENT

20th February and 8th March, 2023

BANZI, J.:

On 1st August, 2017, the Appellant and the Respondent entered into a Joint Venture Agreement of buying and selling cereal crops (rice). In that agreement, the Appellant paid Tshs.30,000,000/= as capital contribution to the business, whereas, the Respondent was responsible for selling by travelling and collecting rice for three trips per month and the profit emanating from the sale which is not less that Tshs.3,000,000/= per trip be divided equally between the parties. Their agreement was to last for three months and after that, the Respondent would return the advanced capital to the Appellant. In order to facilitate the security of advanced capital, the Respondent surrendered his landed property located at Plot No. 571 Block

"DD", Kashai area within the Municipality of Bukoba. The agreement was witnessed by Salama Twalha Katakweba, the wife of the Respondent.

However, sometimes later, the Appellant confronted the Respondent alleging that, he did not honour their agreement by failing to give her the profit generated from their business and return back the capital. Following that, the Appellant instituted a suit against the Respondent claiming among other things, payment of Tshs.48,000,000 being capital contribution and profit generated from the business in accordance with their Joint Venture Agreement. The Respondent denied the claim by stating that, at the time of institution of the suit, he had already paid the appellant the whole due amount Tshs.43,838,000/= being, the capital and generated profit and hence, she had no genuine claims against him. After receiving the evidence of both parties, the trial court dismissed the suit for want of merit. Now the Appellant is before this Court faulting that decision on the following grounds:

1. *That, trial Court erred in law and that the Trial Magistrate did not evaluate evidenced (sic) tendered before the Court.*
2. *That, the trial Court erred in law and fact by deciding that the Respondent did pay the Appellant whereas the Respondent herein did fail to prove his averment at the balance of probability.*

3. *That, the trial Court erred in law and facts by relying on weak evidence of party of the Respondent.*
4. *That, the trial Court erred in law and facts by failing to summarize the issues raised by the Court.*
5. *That, the trial Court erred in law and facts by deciding against the weight of evidence.*

When the appeal was called for hearing, the Appellant was represented by Mr. Jovin Rutainulwa, learned counsel whereas, Mr. Peter Matete, learned counsel appeared for the Respondent. The appeal was argued orally and I sincerely thank learned counsel of both sides for their lucid submissions.

Mr. Rutainulwa began his submission by informing the Court that, he will argue the first, third and fourth grounds jointly while the second ground will be argued separately. He further submitted that, there is no disputed about the Appellant giving the Respondent Tshs.30,000,000/= as capital contribution for their business whereby, the profit generated therefrom would be divided equally between them but the Respondent failed to honour the agreement. After such failure, the Appellant issued a demand note (Exhibit PW1B) claiming for her money and profit. In reply, the Respondent admitted the unpaid amount that was advanced to him amounting to Tshs.30,000,000/= through Exhibit PW1C but he failed to pay which made

the Appellant to issue another demand note (Exhibit PW1D). Thus, through Exhibits PW1B, PW1C and PW1D, the Appellant discharged her duty by proving her claim on the required standard. He supported his argument by the decisions of the Court of Appeal of Tanzania in the cases of **Paulina Samson Ndawavya v. Theresia Thomas Madaha**, Civil Appeal No.45 of 2017 and **Jasson Samson Rweikiza v. Novatus Rwechungura Nkwama**, Civil Appeal No. 305 of 2020 both unreported.

He went on and challenged the evidence of the Respondent claiming to contain contradictions between the Respondent (DW1) and his wife (DW) on the amount they received from the Appellant as capital. Moreover, he challenged Exhibit DW1A alleging that, there is nowhere the Appellant signed to acknowledge receipt of money claimed to be paid by the Respondent. Likewise, the four M-pesa transactions stated to be sent to the Appellant are undoubted because the Respondent did not mention sending or receiving number or reference number of the transaction. Also, he did not produce print out nor did he call an officer from Vodacom to corroborate his testimony. For such failure, he urged the Court to draw an adverse inference against him. Apart from that, it is doubtful if the amount alleged to be handed over to DW3 on 4/10/2017, 16/10/2017 and 18/10/2017 had reached to the Appellant as there is no evidence if DW3 was sent by the

Appellant. Besides, the fact that DW2 made DW3 to sign but failed to make PW1 also to sign raises a lot of doubt.

It was also his contention that, the trial court failed to evaluate the evidence because had it evaluated the evidence properly, it could have reached into a conclusion that Exhibit DW1A was not genuine as nowhere did the Appellant sign to acknowledge receipt of that money. He insisted that, the Respondent had not yet paid that money that is why he is not yet retrieved his title deed he had pledged as security. He urged this Court to re-evaluate the evidence in order to determine if there was execution of payment of 48,000,000/= as alleged by the Respondent. He prayed for the appeal to be allowed with costs by granting all prayers mentioned in the memorandum of appeal.

In reply, Mr. Matete strongly opposed the appeal by stating that, at page 6 to 9 of the judgment, the trial Magistrate evaluated properly the evidence on record and reached into just decision. He added that, as clearly indicated at page 38 of the typed proceedings, it was the Appellant who sent DW3 to go to DW2 to collect her money. He further submitted that, the pleadings that were exchanged between the parties showed that, the Appellant was paid through M-Pesa. Despite this fact being into her knowledge from the beginning but, in her testimony, the Appellant did not

dispute the written statement of defence which shows that, she was paid through M-pesa. Also, she did not testify on her signature not to be in Exhibit DW1A as acknowledgment of payment. Therefore, since PW1 did not contest anything, what was contested by the counsel for the Appellant is apart from being an afterthought, it is a submission from the bar which cannot be acted upon by this Court. Also, this Court cannot draw adverse inference against the evidence of the Respondent.

Concerning the contradiction between the evidence of DW1 and DW2, he argued that, since the Respondent did not contest about receiving Tshs.30,000,000/= from the Appellant, the fact that, DW2 said to receive Tshs.20,000,000/= is minor contradiction which does not go to the root of the matter. He further submitted that; specific claim must be proved as it was stated in the case of **Masolele General Agencies v. African Inland Church of Tanzania** [1994] TLR 192. However, in this matter, the Appellant failed to prove how she arrived into Tshs.48,000,000/= as specific claim while according to their contract, the Respondent was supposed to pay Tshs.1,500,000/= per month for three months which ought to be 4,500,000/=. On the other hand, the Respondent through his witnesses and Exhibit DW1A, he defended his case by proving to have paid the total amount of Tshs.43,838,000/. Concerning the issue of title deed, he replied that, the

same was not an issue in this matter since it was not in the pleadings and parties are bound by their pleadings. Before concluding, he commented on Exhibit PW1C which the Respondent admitted the outstanding debt of Tshs.30,000,000/=. It was his argument that, the same was made on 26/02/2018 and by the time the Appellant filed the case in 2020, the Respondent had already completed to pay the whole amount. Hence, Exhibit PW1C was overtaken by the event. Besides, the Appellant did not contest the evidence concerning such payment. In that regard, he urged the appeal to be dismissed with costs for want of merit.

In his rejoinder, Mr. Rutainulwa submitted that, the Appellant could not have testified over Exhibit DW1A because it was not yet received in evidence. He further insisted that, it was not correct to say that, the Appellant did not deny to receive any money from the Respondent because at page 21 and 23 of the proceedings, she testified on that. He reiterated his chief submission that, the Respondent failed to prove he had paid the outstanding amount after he admitted the same through Exhibit PW1C. He finalised his submission by urging the Court to allow the appeal because the Appellant managed to prove the claims.

After a thorough examination of evidence on record, grounds of appeal and the rival arguments by the learned counsel for both parties, the main

issue for determination is whether the appeal is meritorious. This being the first appeal, I shall re-evaluate the evidence of the trial court and, if necessary, make my own conclusion.

It is undisputed from the evidence of both parties that, there was contractual obligation between the Appellant and the Respondent arising from the joint venture agreement whereby, the Respondent was paid Tshs.30,000,000/= being capital contribution to their business and the profit generated therefrom be divided equally between them. They further agreed that, the profit would be Tshs.3,000,000/= per each trip and each one would get 1,500,000/=. It is also undisputed that, the business was done according to their agreement. Thus, the question that calls for my determination is whether the Respondent paid the Appellant her profit together with the money that she advanced to him. The trial Magistrate in his judgment, after analysing the evidence, he was satisfied that the Respondent paid that money through various modes of payment and he had paid all the money so he was not indebted. His findings relied on Exhibit DW1A.

Throughout the defence, the Respondent and his witnesses explained how the Respondent paid through cash in either by Appellant sending DW3 to collect or by DW2 taking the same to her shop at Soko Kuu Bukoba or through M-Pesa transaction. Looking closely at page 32 to 33 of the typed

proceedings, DW1 testified by stating categorically one transaction after another specifying how much he paid for every particular date. Unfortunately, the Appellant through her advocate did not ask any question to DW1 concerning each transaction including the mobile number and reference number of M-pesa transaction sent to the Appellant. In other words, the Appellant did not cross-examine DW1 on every stated amount on each date, which as a matter of law, ordinarily implies the acceptance of the truth of the witness evidence.

Besides, DW2 admitted to be one who recorded every transaction in Exhibit DW1A. I have carefully examined Exhibit DW1A. Basically, they are just ordinary books of the Respondent containing the record of various entries made in the usual and ordinary course of their business. I find nothing to question authenticity of the contents of those three books because apart from the record of amount paid to the Appellant, they also contain a lot of other transactions and payments made to other persons. Likewise, DW2 was not cross-examined on each and every transaction she recorded in Exhibit DW1A concerning payment made to the Appellant or through her brother-in-law (DW3). Equally, she did not cross-examine DW2 about the Appellant not signing in Exhibit DW1A as acknowledgment of payment despite the fact that, in her chief testimony, DW2 disclosed such

reason that, it was out of trust. In the case of **Juma Kasema @ Nhumbu v. Republic**, Criminal Appeal No. 550 of 2016 CAT at Tabora (unreported) it was held that:

> *"It is trite law that, a party who fails to cross-examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the court to disbelieve what the witness said, as the silence is tantamount to accepting its truth."*

Since DW1 and DW2 were not cross-examined on these vital points, as rightly submitted by Mr. Matete, any alarm to the contrary including the submission from Rutainulwa challenging those Mpesa and other transaction is not only an afterthought but also submission from the bar which cannot be acted upon by this Court.

Before I pen off, I find it prudent to comment on Exhibit PW1C. Notably, there is no dispute that through Exhibit PW1C which is a reply to demand note dated 26th February, 2018, the Respondent admitted to have outstanding debt of Tshs.30,000,000/=. In the same Exhibit, he confirmed to have already paid the Appellant Tshs.13,500,000/= being a profit for three months as per their agreement. This fact is also proved by the testimony of DW1 and Exhibit DW1A which show that, up to 24th October, 2017, he had

already paid the Appellant a total of Tshs.14,600,000/=. Exhibit PW1C was produced by the Appellant herself and hence, it was part and parcel of her evidence. Thus, it is very unbecoming for her to deny about not being paid anything by the Respondent while her own evidence states to the contrary.

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. From the foregoing, it is apparent that, the evidence of the Respondent was heavier than that of the Appellant concerning whether the Respondent had paid the amount due to him. In those premises, it is the firm view of this Court that, through the testimony of DW1 and DW2 as well as Exhibit DW1A, the Respondent successfully proved that, he paid the Appellant the outstanding amount according to their agreement.

Having said so, I find no reason to fault the decision of the trial court. Consequently, I dismiss the appeal with costs for want of merit.

I. K. BANZI
JUDGE
08/03/2023

Delivered this 8th day of March, 2023 in the presence of absence of the Appellant and in the presence of Mr. Projestus Mulokozi, learned counsel for the Respondent who is also present.

I. K. BANZI
JUDGE
08/03/2023