IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

PC. CIVIL APPEAL NO. 04 OF 2023

(Originating from the District Court of Songea at Songea in Civil Appeal No. 15 of 2022 Arising from Primary Court Civil Case No. 13 of 2023)

WENDELINI KOMBA ..... APPELLANT

VERSUS

ELI YORAM MLIGO ..... RESPONDENT

JUDGMENT

Date of last Order: 20/03/2023

Date of Judgment: 28/03/2023

U. E. Madeha, J.

As a matter of fact, this is the second appeal. Before the Primary Court of Mfaranyaki in Civil Case No. 13 of 2022, the Appellant was sued by the Respondent who claimed to be paid an amount of Tanzanian shillings eleven million (11,000,000/=). In that case, after a full trial, the Appellant was ordered to pay the Respondent a total amount of Tanzanian shillings ten million, ninety hundred and ninety-three thousand and six hundred (10,993,600/=). The Appellant was aggrieved by that decision and

he appealed before the District Court of Songea via Civil Appeal No. 15 of 2022. In fact, the first appellate Court found his appeal had no merit as result it was dismissed.

Apart from that, it was an undisputed fact that the Appellant was the Respondent's business partner as they used to do business together. It is important to note that, on several occasions, the Appellant was given money by the Respondent as an agreement that he will buy maize for the Respondent and store in his godown and the Respondent went to collect those maize. It is worth considering the fact that, on 26th November, 2021 the Appellant informed the Respondent that he had maize in his godown at Mgazini Village in Songea District. The Respondent went and found that the maize has a value of twenty million Tanzanian shillings (20,000,000/=). On the same note, he agreed with the Appellant that he will deposit that amount of money in the Appellant's bank account. In fact, the Respondent deposited that amount of money on the same date as it was proved through the bank statement (exhibit M-3).

Moreover, after depositing that amount of money, the Respondent went to hire a lorry. It seems to be true that, that particular lorry was at Kahama at that time. In addition, after few days, the lorry arrived at

Mgazini Village to collect the maize. Unfortunately, the Respondent found the Appellant had already sold the said maize to another person. Surprisingly, even the Appellant was not seen at his godown.

Furthermore, the Respondent claimed to have refunded his money. As much as the evidence is concerned, only nine million, six thousand and four hundred Tanzanian Shillings (9,006,400/=) was refunded out of the twenty million Tanzania Shillings (20,000,000/=). Actually, the Trial Court found that the Respondent had proved his claims only to the tune of ten million, nine hundred and ninety-three thousand and six hundred Tanzanian shillings (10,993,600/=). As a matter of fact, the Appellant was ordered to pay that amount of money. To crown it all, the Appellant was aggrieved by that decision and he appealed before the District Court of Songea which dismissed his appeal for lack of merits. Dissatisfied with the decision of the District Court the Appellant has preferred this appeal. In fact, the grounds of appeal, as they appear in his petition of appeal, are as follows:

1. *That, the first appellate court erred in law and facts being biased by favoring the Respondent herein.*

2. *That, the first appellate court erred in law and facts as it failed to note that the Trial Court failed to evaluate evidence as Respondent herein failed to prove his case.*
3. *That, the first appellate court erred in law and facts for failure to note that the Trial Court failed to receive and admit the exhibits (bank receipts) without due course which were the basis of the Appellant's evidence.*

As a matter of fact, the appeal was canvassed by way of written submissions. The Appellant was represented by none other than the learned advocate Mr. Eliseus Ndunguru whereas the Respondent enjoyed the service of Mr. Makame Sengo, the learned advocate.

Mr. Eliseus Ndunguru, the learned advocate for the Appellant submitted that this appeal contains three (03) grounds of appeal but he opted to abandon the first and third grounds of appeal and he argued basing on the second ground of appeal only. On the second ground of appeal, he submitted that the first appellate Court erred in law when it failed to hold that the Trial Court failed to evaluate the evidence put forward by the Respondent.

Notably, he stated that going through the proceedings of the Trial Court it is clear that the Respondent claimed a total amount of Tanzanian shillings eleven million (11,000,000/=), but the Trial Court awarded the Respondent a total amount of Tanzanian shilling ten million, nine hundred and ninety-three thousand and six hundred (10,993,600/=) the amount which was neither pleaded nor proved. Basically, he argued that if the first Appellate Court would have been keen and considerate enough, it would have held that the Trial Court failed to evaluate properly the evidence which was presented before it. Consequently, he contended that the first Appellate Court held that the Respondent's claim was proved but before the Trial Court the claim was for an amount of Tanzanian shillings eleven million (11,000,000/=) but the evidence proved only an amount of Tanzanian shillings ten million, nine hundred and ninety-three thousand and six hundred (10,993,600/=).

The Appellant's learned advocate submitted further that since the claim before the Trial Court was for an amount of Tanzanian shillings eleven million only (11,000,000/=), the Respondent was ought to give his evidence to prove that figure and no more or less of the claimed amount. He concluded that since the Respondent failed to prove his claim of

Tanzanian shilling eleven million (11,000,000/=), instead he proved an amount of Tanzanian shillings ten million, nine hundred and ninety-three thousand and six hundred (10,993,600/=), the Trial Court was ought to hold that the claim before it was not proved.

To add to it, he further contended that going through the typed proceedings of the Trial Court the same does not show that the Respondent tried to depart from his original claim which was presented before the Trial Court. In that case, it is very clear that the Trial Court ordered the Respondent to be paid an amount of Tanzanian shillings ten million, nine hundred and ninety-three and six hundred (10,993,600/=), the amount which was not pleaded.

He humbly submitted that if the Trial Court would have properly evaluated the evidence tabled before it, it would have not arrived at the conclusion that the Respondent did prove his case beyond the balance of probability. Conclusively, the Appellant's learned advocate prayed for this Court to step into the shoes of the first Appellate Court and re-evaluate the evidence and hold that the matter before the Trial Court was not proved beyond the balance of probabilities and allow the appeal with costs.

On the other hand, Mr. Makame Sengo, the Respondent's learned advocate while resisting the appeal he replied that, in civil litigations, it is a cardinal principle that the parties are only bound to prove their claims on the balance of probabilities, unlike in criminal cases where the prosecution (claimants) was required to prove beyond reasonable doubt.

On the same note, he stated that in civil suits unlike in criminal claims, every party to the suit has an evidential burden to be discharged and the Judge or Magistrate in deciding any civil claim has to compare whose evidence is heavier than the other. To put it in a nutshell, he cited with approval the case of **Re B [2008] UKH 35**, in which the balance of probabilities was defined by Lord Hoffman as:

> *"if a legal rule requires a fact to be proved (a fact in issue), a Judge or Jury must decide whether or not it happened. There is no room for finding that it might happen. The law operated in a binary system in which the only value are **0** and **1**. That fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by the rule that one part or other carries the burden of proof. If the party who bears the burden of proof fails to*

*discharge it, a value of **0** is returned and the fact is treated as not having happened if he does discharge it; a value of **1** is returned to and the facts is treated as having happened."*

To add flavor to it, he further stated that there is no dispute that the Appellant owes the Respondent's money which the Respondent claimed to have deposited in the Appellant's bank account number **61810011414** (NMB). The same was proved by the Bank paying slip which was admitted as exhibit M-1 and the testimonies of PW1, PW2, DW2. For more emphasis reference was made in the case of **Mr. Mathias Erasto Manga v. M/S Simon Group (T) Limited**, Civil Appeal No. 43 of 2013, the Court of Appeal of Tanzania (unreported), quoted the decision of **RE Minor** (1966) AC 563 at page 586, in which it was held that:

"The balance of probability standard means a court is satisfied an event occurred if the court considers that, on the evidence the occurrence of the event was more likely than not"

Notably, he further contended that referring to the proceedings of the Trial Court, it reveals that the Respondent has discharged his evidential

burden to prove that he owes the Appellant. That according to the available evidence the probability that the Appellant is owing the Respondent's money is more likely than not since it is clear that the Respondent was refunded only Tanzanian shillings nine million, six thousand and four hundred (9,006,400/=), which were paid on installments out of Tanzania Shillings twenty million (20,000,000/=). Basically, he stated that the Respondent still owes the Appellant's an amount of Tanzanian shillings ten million, nine hundred and ninety-three thousand and six hundred (10,993,600/=).

He further averred that the Respondent was not required to prove his claim beyond the balance of probability but on the balance of probability. He submitted that; such evidential burden does not apply in civil suits. To put more emphasis, he cited the case of **Charles Richard Kombe T/A Building v. Evarani Mtungi & 2 Others,** Civil Appeal No. 38 of 2012, Court of Appeal of Tanzania at Dar es Salaam (unreported) in which the Court held that;

> *"... it is clear that the learned Judge applied the standard of proof applicable in civil as well as criminal matters. We need not cite any provision of law because this being a*

civil matter, it is elementary that the standard of proof is always on the balance of probabilities and not beyond a reasonable doubt. Further, the two could neither co-exist nor be applied interchangeably as was done in this case. The application of the afore-stated standard of proof of both criminal and civil in this case is to say the least is novel and indeed puzzled us. We do not think the decision arrived at, in the circumstances, is sound in law."

Conclusively, he stated that this appeal has no merit and it is just a missuses of the Court's precious time and he prayed the same to be dismissed in its entirety with costs.

As much as I am concerned, I have gone through the petition of appeal which encompasses three (03) grounds of appeal of which Mr. Eliseus Ndunguru, the Appellant's learned advocate abandoned the first and third grounds of appeal and he preferred to argued only on the second ground of appeal.

In view of the second ground of appeal there are two issues. The **first** issue is whether the first Appellate Court and the Trial Court failed to

evaluate the evidence and the **second** issue is whether the Respondent proved his claim to the required standard.

From Exhibit M-1, it is obviously shown that the Respondent deposited twenty million Tanzania shillings (20,000,000/=) in the Appellant's bank account number **618110011414** (NMB) with account name of the Appellant (Wendelin Komba). To add to it, the Respondent who is none other than Eli Yoram Mligo, tendered the deposit slip which was admitted as an exhibit "M-1". Basically, the money was deposited in the Appellant's account who was the seller. On the same note, from the available evidence it appears that the Appellant has refunded the Respondent only nine million and six hundred thousand (9,600,000) Tanzania shillings. In that case, it is an undisputable fact that the parties to the suit had a business transaction. They also had other transactions in which the Respondent has no dispute with those transactions.

From the available evidence it is clear that the parties had no written contract. As a matter of fact, in this suit looking on the intention of parties and their conducts it is clear that they had a transaction in which the Respondent was buying maize from the Respondent and the Appellant as the seller was paid the money. Whether the maize was delivered to the

Respondent (buyer) is a matter of fact which is in dispute. The Appellant's evidence is not clear, he had to give evidence on the amount of maize which he handled to the Appellant or how many Tanzania shillings was given by the Respondent. So far, from the testimony of the Appellant given before the Trial Court it is not clear that whether the maize was delivered to the Respondent.

Principally, I do not hesitate to state that there were other previous transactions in which the Appellant and the Respondent has a business transaction of selling and buying maize which are not in dispute. Before the Trial Court the Respondent was complaining of his money amounting to TZS. 20,000,000 deposited on 26th November, 2021, since the maize were not delivered to him after the deposit of the money.

Similarly, I have gone through the case records and found that the parties had no written contract on their transactions. The evidence given before the Trial Court proves that the money was deposited by the Respondent but there is no evidence to prove that the maize was taken by the Respondent. See Section 20 (b) and (c) of the *Sales of Goods Act* (Cap. 214), states to the effect that:

(b) *"where there is a contract for sale of a specific goods and the seller is bound to do something to the goods for the purpose of putting them in the deliverable state, the property does not pass until such thing is done and the seller has notice thereof.*

(c) Where there is a contract for sale of a specific goods in a deliverable state, but the seller is bound to weight, measure, test and do other act or things with reference to the goods for the purpose of ascertaining the price of the property does not pass until such thing is done."

In this case, the issue here is whether the Appellant's maize product was in a deliverable state. It is a fact that, the Appellant was supposed to give evidence to prove how he delivered the maize to the Respondent worth TZS. 20,000,000 which the Respondent deposited in the Appellant's bank account for the intention of buying maize.

To put more emphasize see the case of **Engen Petroleum (T) Limited v. Tanganyika Investment Oil and Transport Limited**, Civil

Appeal No. 103 of 2003, Court of Appeal (unreported). The issue was whether the contract existed between the parties. The Court held that:

> *"We reinforce in view of the provision of section 5(1) of the Sales of Goods Act, which states;*
>
> *5(1) Subject to any other written laws on that behalf, a contract for sale may be made in writing (either with or without seal) or by word of mouth, or partially in writing and partially in word of mouth or may be impliedly from the conduct of the parties. We are satisfied that the transaction involving the parties to this suit was an oral contract for the sale of petroleum products under which the appellant supplied petroleum products to the respondents for the sale of the due price or local currency".*

Likewise, the same position was stated in the case of **Sangijo Rice Miller Co. Ltd v. S.M. Holding Ltd** (2006) TLR 89; in which it was held that:

"The purchase order together with the conduct of parties constitutes an agreement to sale."

In the case of **Engen Petroleum (T) Limited v. Tanganyika Investment Oil and Transport Limited** (supra) the Court observed further that:

"Although the learned Judge erroneously held that there was no contract between the parties, a careful scrutiny of the evidence, conduct of parties and the circumstances of the case established that there was an oral contract of sale of petroleum products by the appellant/plaintiff company to the respondent/defendant company."

To put in a nutshell, looking at the available evidence in this case clearly shows that on 26th November, 2021, the Respondent deposited an amount of TZS. 20,000,000 in the Appellant's bank account (account number 61810011414) for the purpose of buying maize product from the Appellant. The Respondent sufficiently proved the deposit of that money through the bank statement (exhibit M-3). On the same note, I strongly

believe that the agreement between the Appellant that is, the seller and the Respondent, the buyer was orally made.

Besides, considering the appeal at hand, I have also observed that the conduct of the parties and the circumstances of the case establishes that there was an oral contract between them. It is clear that the Respondent deposited the money into the Appellant's bank account for an agreement of buying maize. There is ample evidence that the Respondent deposited TZS. 20,000,000/= to the Appellant's bank account.

From the available evidence, I am satisfied that the weight of the Respondent's evidence is greater than that of the Appellant. This is because the Appellant failed to discharge his evidential burden of proving for what purpose the money which was deposited by the Respondent in his account. The Respondent proved on the balance of probabilities that he deposited money in the bank account of the Appellant was for the purpose of buying maize. The argument by the Appellant's counsel that the Respondent was to prove his case beyond the balance of probability is distinguishable in this matter. To my understanding, the standard of proof in civil suit is on the balance of probabilities. Rule *6 of the Magistrates Courts (Rules of Evidence in Primary Courts) Regulations, G.N No. 66 of*

1972 guided the Trial Court in deciding the matter. The rule reads as follows:

> *"In civil cases, the court is not required to be satisfied beyond reasonable doubt that a party is correct before it decides the case in its favour, but it shall be sufficient if the weight of the evidence of the one party is greater than the weight of the evidence of the other. "*

Under the circumstances of this case, I find that the lower Courts properly evaluated the evidence and they reached a correct decision that the Respondent had a valid claim against the Appellant.

Having answered the first issue in the affirmative, the second issue on whether the Respondent proved his claim, I am in the view that from the available evidence, it is clear that the Respondent's evidence was heavier enough to prove his claims. Conclusively, I hereby uphold the decision of the two lower Courts and dismiss this appeal with costs. Order accordingly.

DATED and **DELIVERED** at Songea this 28th day of March, 2023.

U.E MADEHA

JUDGE

28/03/2023

COURT: Judgment delivered on this 28th day of March, 2023 in the presence of the Applicant and the Respondent. The right of appeal is fully explained.

U. E. MADEHA

JUDGE

28/03/2023