IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

(PC) CIVIL APPEAL NO. 01 OF 2023

(Arising from Civil Appeal No. 3 of 2022 of the District Court of Kasulu before I.E.Shuli – SRM, Original Civil Case No. 3 of 2022 of Kasulu Urban Primary Court before R.I.Shineneko – RM.)

JEREMIAH KABATITI ..... APPELLANT

VERSUS

JOSEPHAT MATHIAS..... RESPONDENT

JUDGMENT

2/6/2023 & 30/6/2023

Mlacha, J.

This appeal gets its genesis from the Urban Primary Court of Kasulu district at Kasulu in civil case number 4 of 2022. It passed through the district court before coming here. The appellant Jeremia Kabatiti was the defendant at the primary court. The respondent Josephat Mathias was the plaintiff. The appellant lost in the two courts below hence the present appeal.

The claim at the primary court was Tshs. 16,125,000/= being the principle amount Tshs. 8,125,000/= and interests Tshs. 7,000,000/=. It was alleged that the respondent had advanced the appellant Tshs.

12,125,000/= to be used in a business of purchasing beans at Kasulu and selling them in Mwanza. The appellant who is an auctioneer was to remit Tshs. 1,000,000/= monthly as profit but he could not do so. On being pressed he paid Tshs. 4,500,000/= in two installment leaving a balance of Tshs. 8,125,000/= hence the matter going to the primary court. The evidence of the plaintiff show further that there were two earlier business transactions which went smoothly and are not the subject of the claims before the court.

In defence the appellant did not dispute to receive money from the respondent. His defence was that he had already paid the amount. He tendered bank receipts showing a total payment of Tshs. 7,800,000/= paid to the respondent in August and September 2021 through his CRDB accout. He did not speak of the interests. The trial court found that the tendered receipts were in respect of earlier transactions. It believed the respondent and his witnesses. It discredited the appellant. It awarded both the principle amount and interests total Tshs. 16,125,000/=. An appeal to the district court could not be successful hence this appeal with the following grounds: -

1. That the Honourable 1st magistrate grossly erred in law for not observing that the trial court had no jurisdiction to entertain the commercial case.
2. That the Honourable 1st Appellate Magistrate grossly erred in law for misdirecting the evidence in record that there was a loan agreement of T.sh. 12,625,000/= together with the interest of 1,000,000/=per month.
3. That the Honourable 1st Appellate Magistrate grossly erred in law in not making a finding that all facts not cross examined upon at trial where probable not material facts as all material facts were cross-examined upon.

During this appeal the appellant had the legal services of Julius Mushobozi, advocate while respondent was represented by Mr. Moses Rwegoshora, advocate. The case was heard by written submission.

Counsel for the appellant consolidated grounds two and three. He argued the first ground separately. Submitting on grounds two and three, he said that the subordinate courts misapplied the principle of admissibility of facts by holding that failure to cross examine is equal to acceptance of the facts. He insisted that if the evidence was not challenged, the court must satisfy itself on such evidence whether it was improbable, vague,

and contradictory or not. In support of his submission he cited the cases of **Zakaria Jackson Magayo vs The Republic,** (CAT), Criminal Appeal No. 164 of 2016 with the approval of the decision of the case of **Kwiga Masa v. Samueli Mtubatwa,** [1989] T.L.R 103 and **Emmanuel Saguda @ Sulukuka vs The Republic,** (CAT), Criminal Appeal No. 422 of 2013. Counsel submitted that the first appellate court followed the decision of the trial court which had no evaluation of evidence. He argued that if the first appellate court could evaluate the evidence, it could not arrive at the decision it made which was erroneous.

Counsel went on to submit that Exhibits D1-D8 which were found to refer to transactions of Tarime did not refer to tarime but Kasulu activities. He went on to say that the issue of Tarime is immaterial because it didn't relate with the framed issues. He added that the respondent did not prove exactly when the Tarime consignment was paid. He added that a specific date on the month of April could be revealed by the respondent could serve the purpose but it was not revealed and the court turns and evaluate the evidence of the appellant in respect of Tarime consignment, while the same was dully paid.

He submitted that the respondent did not put clear when the Kasulu consignment negotiation was done or if the Tarime consignment was still

pending adding that there is no legal requirement for the appellant to produce in court the receipts for Tarime consignment and there is no need for the court to discredit/ disbelieve the evidence of the appellant and exhibit DW1-8. He argued that the debt have already been paid and there was no provision of interest as alleged. It was further submitted that the respondent had obligation to prove that the debt of Kasulu was not paid and the appellant had a duty to prove that the debt was paid. He concluded by saying that there was no proper application of laws and principles.

Counsel proceeded to submit that there was contradiction on the amount of money to be paid to the respondent as profit. The respondent testified that the profit was Tsh. 1,000,000/= per month, SM2 a wife of the respondent did not testify on such profit, SM3 told the court that the interest was 300,000/= per week while SM4 said the interest of Tshs. 1,000,000/= was for 7 months. On jurisdiction, Counsel for the appellant submitted that the case was a commercial case valued Tsh. 16,000,000/= hence the primary court lacked jurisdiction to entertain the suit. He referred the court to section 40(3) of MCA cap 11 R.E. 2019, **Waziri Hassan vs Arafa Bakari,** Civil Appeal No. 12 of 2017, (HC Tanga) and

Edwin Isdori Elias v Serikali ya Mapinduzi ya Zanzibar [2004] TLR297 to support his submission.

Submitting in reply, counsel for the respondent opposed all the three grounds. He said that the grounds of appeal now before the court were not raised in the district court hence the court should not entertain them. He cited the case of **Godfrey Wilson vs The Republic**, (CAT), Criminal Appeal No.168/2018 and **Hassan Bundala @Swaga vs The republic**, Criminal Appeal No. 386 of 2015 to support this view. Submitting on failure to make cross examination on material facts, he said that it implies the acceptance of the truth of the witness. He made reference to the case of **Zakaria Jackson Magayo** (supra) and said that the case removes an absolute rule that failure to cross examine is equivalent to accept the facts.

Replying to the facts relating to Tarime consignment it was submitted that it was material because it was the foundation for trust of business at Kasulu and failure to cross examine makes the presumption that it was accepted. Concerning Tsh.5837,000/= of which the appellant failed to challenge at police station, it was submitted that it is a proof that the respondent demanded money from the appellant. And all facts unchallenged by the respondent did not fall under the category mentioned

by the appellant to be improbable, vague or contradictory. He added that failure of the appellant to cross examine the facts of the respondent does not mean that the same were improbable, vague or contradictory and if not incredible, it means that he admitted the facts, this goes to 1,000,000/= as a profit which was not challenged.

On the issue of jurisdiction, counsel submitted that the matter was a normal civil suit even if it has commercial elements, the primary court has jurisdiction. Contrasting the case of Waziri Hassani (supra), he submitted that, the cited case was not oust the jurisdiction of primary court on commercial case. Section 40(3) of MCA is silence on the pecuniary jurisdiction of the primary court in commercial matters. Finally, it was his prayer that the appeal be dismissed with costs.

In brief rejoinder there was nothing new apart from reiterating the earlier position.

I had time to read the record closely. I have also read the cases cited by counsel in the course of submissions. Counsel have made long submissions but with respect, I don't think that much of what was said was needed. I see the matter differently. I will examine the grounds of appeal one by one starting with ground one. This is on the jurisdiction of the primary court to hear the case. It was argued that the primary court

did not have jurisdiction to try the dispute because it was a commercial dispute. Reference was made to section 40 (3) of the magistrates Courts Act, cap 11 R.E. as the authority for this proposition. Counsel for the respondent did not accept this. I agree with him. With respect to the counsel for the appellant, section 40 (3) is on the jurisdiction of the district court in commercial cases. It has nothing to do with the jurisdiction of primary courts. Neither is there any provision in the law which bar primary courts to try commercial cases. They are triable at the primary court and are usually filed as normal civil cases. There is no distinction between normal civil cases and commercial cases at that level.

Civil jurisdiction of Primary Courts is contained under section 18 of Magistrate Court Act, subsection (1) (a) (iii) reads: -

> *"For the recovery of any civil debt arising out of contract, if the value of the subject matter of a suit does not exceed third million shillings,"*

See also **Peter Temu @ Dr Tenga vs. John Lyali** (HC – Musoma) Civil Appeal No. 11 of 2020. By Kahyoza,J

In ground two, the complaint is that there was not proper evaluation of the evidence on records. That the district court misdirecting itself on the evidence thereby reaching to an erroneous finding that there was a loan

agreement of T.sh. 12,625,000/= which had interest of 1,000,000/=per month. The contract between the parties was oral. It was alleged that after two successful attempts of business between the parties in Mwanza and Tarime and a further show at Kasulu, the appellant managed to impress the respondent that he was a trustworthy person who went to the bank and gave him Tshs. 12,625,000/=. He gave him the money for him to do the business of buying and selling beans and could it turn pay a monthly profit of Tshs. 1,000,000/=. He could not pay the monthly profits as agreed. On being pressed to return the money, he paid Tshs. 4,500,000/= leaving the unpaid balance of Tshs. 8,125,000/= which added with the monthly interest brought the amount claimed. The appellant agree to receive the money but does not accept to be indebted. His defence was that he has already paid the amount. He tendered the receipts as exhibits. The lower courts found that the receipts were in respect of earlier transactions.

Looking through, I have come to realize that this was a case based mainly on credibility of witnesses. In **Mapambano Michael @ Mayanga vs Republic,** Criminal Appeal No. 268 of 2015 page 12 it was said as follows:-

"... every witness is entitled to credence and whoever questions the credibility of a witness must bring cogent reasons beyond mere allegations"

Speaking of the monopoly of the trial court on credibility of witnesses, the Court of Appeal had this to say in **Amani Justine @ Mpare vs The Republic,** Criminal Appeal No. 131 of 2018 page 14:-

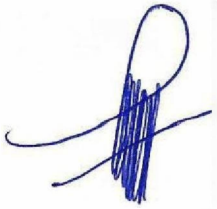
*"..... the credibility of any given witness is the monopoly of **the trial court and it is always in a better position** to assess it than this Court, we find no justifiable cause to fault that finding of the trial court."* (Emphasis added)

See also **DPP v. Jaffari Mfaume Kawawa** [1981] TLR 149, **Shaban Daud v. R**, Criminal Appeal no. 28 of 2000 and **Benedict Buyobe v. R,** Criminal Appeal No. 354 of 2016 (both unreported).

The primary court had opportunity to assess the credibility of all witnesses. It believed the respondent and his witnesses as against the appellant. The defence of the appellant that he had paid the money through the receipts was rejected by the primary court. The finding of the primary court was upheld by the district court making a concurrent finding of facts. I could not see any fault of in the assessment of evidence in this area. I see no room for interfering with the concurrent finding of facts of the two courts on that aspect.

But much as I agree that there was good evidence to show that the appellant was given Tshs. 12,625,000/= by the respondent and that he paid Tshs. 4,500,000/= leaving the balance of Tshs. 8,125,000/=, I don't agree that he should pay interest. I have a number of reasons. One, as observed by counsel for appellant, the evidence on this aspect is shacking. His evidence and that of his witnesses including his wife was contradictory. They did not speak the same figure and duration. Two, the words of the respondent lack logic. His first words were that the appellant was an auctioneer (dalali), selling beans for him. The business was his, the appellant was his agent. If the appellant was an auctioneer or agent for the respondent, why is it now that he is required to pay interest? I think that this idea was just introduced to penalize him. There is no truth in it. Three, the interest of Tshs. 1,000,000/= per month on 12,625,000/= is too big and unrealistic. It sounds like an open lie. Four, the bases of charging interest were not established. He must have first established the basis. No business licence was tendered or any evidence showing that he was lending money on interest.

Ground three is poorly coached. I could not get exactly what it seeks. Giving elaboration during submission, counsel for the appellant said that the district court erred by holding that failure to cross examine is equal to



acceptance of the facts. I have tried to reason out in those lines but I could not see any problem with the finding of the district court. I accept the observations of the district court.

I will in the end allow the claim of Tshs. 8,125,000/= with no interests. The appeal is party allowed with costs.

It is so ordered.

L.M.Mlacha

Judge

30/6/2023

Court. Judgment delivered in the presence of both parties. Right of appeal explained.

L.M.Mlacha

Judge

30/6/2023