IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

CIVIL APPEAL NO 53 OF 2022

(Arising from the Resident Magistrate Court of Arusha Civil Case No 50 of 2022)

SHADES OF GREEN SAFARIS..... APPELLANT

VERUS

JMS TRAVEL SERVICE .....RESPONDENT

JUDGMENT

13th November, 2023

D.D NDUMBARO, J.

Appellant Shades of Green is appealing against the Judgement and decree of Resident Magistrate Court of Arusha at Arusha following the claims against him on the provision of air ticketing services, The trial Magistrate ordered Respondent Shades of Green (now appellant) to pay J.M.D Travel Service (now respondent) USD 22, 350 unpaid amount of air ticketing, the interest rate of 7% from 26 June 2020 to the date of judgment and general damage of USD 1,000. Dissatisfied with the judgment and decree the appellant lodged a memorandum of appeal to this Court with six grounds.

On the 1st ground, the appellant faulted on a variation of P4 and P3. The amount of USD 22,400 pleaded in plaint (para 3), and documentary evidence of exhibit P4 which is two cheques amounted to USD 10,000 each—claiming that variation could not fairly justify the decree issued. He called upon this court to re-examine figures in evidence and figures in the decree. Faulted further that the trial court wrongly used exhibit P3 (the email) that, mail sent by the appellant contained TSZ 22,350. The trial court changed it to USD 22,400. The trial court was not conferred with any power under the law to change the currency from TZS to USD.

He quoted the said mail as;

Please note that the cheque that we issued in May, 2029 we have deposit cheques travel with that amount our records show that we have paid JMD Travel more than 325,000 and ***Tzs, 22,530*** *is a very small amount compared to what we have paid you.*

On the 2nd ground, the appellant contended that they are not indebted at all, they paid for all services rendered by the respondent, and they paid almost 800 million to the Respondent.

On the 3rd ground, the applicant argued that the respondent alleged to claim USD 22,400 against the appellant, however, the trial court could not consider putting the respondent into proof, based on the evidential principle that, who alleges must prove.

On the 4th ground, the appellant claimed that exhibit P4 containing USD 10,000 was duplicated into two, and in the trial court degree appellant was liable to pay USD 22,350, he claimed the amount was speculated by the trial court. they submitted TZS 22,350 but the trial court presumed to be USD 22,350, without any independent evidence. Further, there was no agreement/contract entered between the parties.

5th ground appellant faulted on the validity of presumed contract and capacity of the parties to the said contract, invoices used and other legal formalities (on pages 10 and 11) on typed proceeding were ignored.

In reply, the respondent chose to reply to the 1st and 3rd grounds together. The respondent argued that the evidence used was sufficient to prove the claim against the applicant, in the email conversation from appellant specifically used the word ***cheques*** which denotes having more

than one cheque for the plaintiff; these can be seen in the applicant quoted email in 1st ground of his submission in chief that;

Please note that the cheque that we issued in May, 2029 we have deposit ***cheques*** *travel with that amount our records show that we have paid JMD Travel more than 325,000 and Tzs, 22,530 is a very small amount compared to what we have paid you.*

Respondent argued that they discharged the burden of proof as per sec 110,112,113,114 & 115 of the Law of Evidence Act Cap 6 on how the claim of 22,400 arose, the burden is shifted to the Respondent in the trial court to disprove.

On 2nd ground, the appellant claimed, the trial court magistrate was not correct in awarding the respondent a sum of USD 22,350. Respondent disproved the claims through documentary evidence of email and cheque. P3 & P4 respectively.

In 4th ground initially appellant challenged the non-existence of any agreement between the appellant and respondent. Respondent argued that the contractual relationship was proved through the admission of exhibits. P3 and P4.

In the 5th ground, the respondent argued that the trial court considered an oral contract after satisfying that, the parties have commercial arrangements. on the issue of the capacity of the parties contracted is considered to be the internal arrangements. There was no dispute that the parties had commercial arrangements even DW1 confirmed to have known.

Going through the pleadings in the trial court (plaint and written statement of defence WSD) and other trial court documents such as an affidavit of authenticity, the trial court proceeding and judgment, on the first ground this Court draw a question as to whether the trial court's decision awarding respondent 22,400 occasionally leads to a miscarriage of justice. **Sections 110 and 111 of the Law of Evidence Act, Cap. 6 R.E 2019** provides that: - "110. Whoever desires any court to give judgment as to any legal liability dependent on the existence of facts which he asserts must prove that those facts exist. Therefore, the burden of proving the answer to the raised question lay to the respondent who was a plaintiff in the trial court.

The defendant (appellant in this case) argued that exhibits P3 and P4 were not sufficient to support the claimed amount of 22,400, the trial court

ought to consider the email communication showing the claimed amount was TZS 22.350 and not USD22,400, and he quoted the mail as:-

"Please note that the cheques we issued in May 2019 were deposit ***cheques*** *with that amount, our records show that we have paid JMD TRAVEL more than USD 325,000 and TZS 22,530 is a very small amount compared to what we have paid"*

On the above quoted mail respondent argued that mail shows that there was more than one cheque, that is two **cheque**s. While the defendant on the same quoted mail argued that, what was pleaded by the defendant to be left was TZS 22,530 and not USD 22, 400.

The question to be asked is, despite the presumption raised by the applicant as to the probability of figures amounting to 22, 400 and 22,530 to be in the same **currency** that is Tanzania Shillings. Mathematically the two figures are not similar.

I went into perusing the invoices admitted under Exhibit P2, (drawn from the mail correspondences) as to whether will help draw probability to the currency, I found that all of the exhibits are in USD currency. This draw probability as the amount claimed was in USD currency.

On the issue of quoted mail to the variation in the currency, it was not worthy to rely on it as evidence to disprove the claimed amount and currency, because parties interpreted the quoted mail differently and had no additional evidence to support the quoted mail as variation in figure and currency. Therefore, this court found that the trial court reached into fair decision awarding the plaintiff USD 22,350.

On the second ground, the applicant claimed to have paid respondent TZS 138 million and USD 331,662 almost 800M, and he continued to pay money even after the issuance of the demand note (pages 13,14,15and 16 of typed proceedings). He faulted the claimed balance would not remain the same.

In the trial court's typed proceedings (pages 14 and 14) the defendant (appellant in this case) denied having received invoices for the claimed amount, and there was no agreement between him and the plaintiff. He claimed to have paid the plaintiff more than USD 320,000 around Tshs 700-800 Million and TZS 13,000,000. During cross-examination, he admitted to sending one cheque worth USD 10,000 but not two cheques as claimed by the plaintiff.

The evidence of the defendants contradicting each other. such kind of evidence accords less weight in the eye of the law and will benefit the opponent. this is supported by the case of **Lusungu Duwe v R, Criminal Appeal No. 76 of 2014 (Unreported). Similarly, in the case of Sahoba Benjuda v The Republic, Criminal Appeal No.96 of 1989,** it was held that:

> *"Contradiction in the evidence of witnesses affects the credibility of the witness and unless the contradiction can be ignored as being minor and immaterial the court will normally not act on the evidence of such witness touching on the particular point unless it is supported by some other evidence."*

Based on the above-cited cases, I found that the evidence of the respondent in the trial court was not credible and therefore, this ground has merit.

Third ground, the plaintiff (the respondent in this case) alleged to owe the defendant USD 22,400 he was required to prove the allegation as per sections 110 and 111 of Law of Evidence Act Cap 6. In cross-examination (pages 9 and10 trial court proceeding) and judgment (page 6), the plaintiff tendered exhibits P1(affidavit of authenticity) P2 (invoices, previously

marked by plaintiff JMD1), P3(email correspondences), and P4 (bounced cheque) the exhibits were admitted before the trial court in supporting his claim. He also tendered two cheques of USD 10,000 each, of the said cheques bounced. The defendant (the appellant in this case) did not object to tendering, however, he denied two cheques and, in cross-examination, admitted to having sent to the plaintiff one cheque worth USD 10,000.

Fourth ground defendant (the appellant in this case) denied having any agreement with the plaintiff. One Hilda (who was his employee) to have acted with no capacity (on page 13 of trial court proceedings), she was not responsible for the affairs of their company. The plaintiff (respondent in this case), argued his case by issuing email correspondences. During cross-examination, the defendant argued one Hilda committed only to paying TZS 22,350 which was the only balance claimed by the plaintiff. But the court awarded the plaintiff USD 22,350 which did not manage to prove.

At first, the defendant denied Hilda having no authority over the affairs of the company and, later on approved the payment she made to the respondent.

I consider this to be cherry-picking, choosing whatever benefited and rejecting what is not of his benefit. This kind of evidence shakes the demeanor of the appellant.

The fifth ground on the applicant argues that a person concluded a contract to have no capacity. I analyzed the issue of capacity contracts based on section 11 of the Law of Contract Act Cap 345.

The definition of capacity Section 11. of the Law of Contract Act Cap 345 provides; -

(1) Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

(2) An agreement by a person who is not hereby declared to be competent to contract is void

From the definition above there is no doubt that Hilda acted in a legal capacity and was capable of contracting. Even if the appellant would raise the issue of misrepresentation under sections 18 and 19 Cap 345 supra, yet may not lender the contract void.

From the above analysis, it is clear that the applicant was trying to avoid responsibility by *cherry-picking* by picking what was good and denying what was bad from the action of one Hilda.

After extracting the evidence from both sides, the plaintiff maintained his claim of 22,400 with support of evidence tendered before the trial court. While the defendant disproved the fact without additional documentary evidence to corroborate, despite his evidence not collaborated the evidence contradicts each other. I found that the appellant submitted six grounds of appeal to have no merit.

I therefore upheld the trial court Judgment with cost as prayed by the respondent in this case.

It is ordered accordingly.

The right of appeal has been explained

DATED at **ARUSHA** this 13th day of November 2023.

D. D. NDUMBARO

JUDGE