



THE JUDICIARY OF TANZANIA
IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT SHINYANGA
(CORAM: HON. FRANK MAHIMBALI)

PC CIVIL APPEAL NO. 000004406 OF 2024

LABAN YASON COMPLAINANT / APPELLANT / APPLICANT / PLAINTIFF

VERSUS

HOREST PROTAS RESPONDENT / DEFENDANT

JUDGMENT

Fly Notes

-Proof of civil cases - balance on probability -second appeal - whether the second appellate court can differ with the concurrent findings of the two lower courts.

Facts

The respondent herein filed a Civil suit before the trial court claiming against the appellant a total of Tshs 15,668,250/= It was alleged that on diverse dates between February 2022 and April 2022, the appellant was given the mentioned amount by the respondent for the aim of purchasing rice paddy (mpunga/gunia za mpunga). Instead, the appellant bought little paddy and absconded the other without any reasonable cause. The respondent made all necessary efforts to recover his monies, but he was culmed by the appellant that, he had passed through financial difficulties and thus he should tolerate him for a while as he would be reimbursed with such amount.

Ratio Decidendi

"Where there are concurrent findings of facts by two courts, the Court of Appeal, as a wise rule of practice, should not disturb them unless it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure".

28th of May 2024

Hon. MAHIMBALI.:

JUDGMENT

29th April & 28th May 2024

F.H. MAHIMBALI, J

The respondent herein filed a Civil suit before the trial court claiming against the appellant a total of Tshs 15,668,250/= It was alleged that on diverse dates between February 2022 and April 2022, the appellant was



given the mentioned amount by the respondent for the aim of purchasing rice paddy (mpunga/gunia za mpunga). Instead, the appellant bought little paddy and absconded the other without any reasonable cause. The respondent made all necessary efforts to recover his monies, but he was culmed by the appellant that, he had passed through financial difficulties and thus he should tolerate him for a while as he would be reimbursed with such amount.

As times went on, the appellant denied to have taken monies from the respondent for such a kind of business. Being the case, the respondent filed a suit at the trial Court. The trial court after a full consideration of the case entered its judgment in favour of the respondent and ordered the appellant to pay the respondent the claimed amount.

Aggrieved by the decision, the appellant unsuccessfully appealed before the first appellate court. He has now approached this Court armed up with three grounds of appeal which all boil under the question of evidence, that there was no evidence to proof the claims by the respondent.

During the hearing of this appeal, the appellant appeared in person and unrepresented while the respondent enjoyed legal services of Ms. Rose Suleiman learned advocate.

Arguing for the appeal, the appellant had no much to say instead prayed for his appeal be allowed. He however prayed for his grounds of appeal be adopted to form part of his appeal submission. He also added that there has been no evidence that he was really indebted to the tune of Tshs 15,668,250/=. All this that had transpired is a cooked story by the respondent. There is no any truth in it. He therefore pressed for the appeal to be allowed as prayed.

On the side of the respondent, **Ms Rose submitted that** with the first ground of appeal that the first appellate court failed to evaluate evidence, is not true. Reading the judgment of the first appellate court from pages 15 - 17, the appellate magistrate evaluated the whole evidence. Thus, this ground of appeal is erroneous as it cannot stand as per available evidence.

Further, Ms. Rose in respect to the second ground appeal submitted that; that the respondent failed to establish his case, is not merited. She submitted that it is not true as the respondent squarely established his case against the appellant in weighing the scale of justice. As the proof in civil cases is on preponderance of probability, the respondent did it as per law. The appellant on his part, just made a general denial which is evasive. That alone, was not a disapprove of the claims against him. Thus, this ground of appeal equally fails.

On the third ground, that the first appellate magistrate shifted the burden of proof to the appellant, Ms Rose stated that the same is not tenable as the first appellate court did not receive any evidence but only made some clarifications on why that verdict was reached. Thus, the first appellate court erred nothing as propagated. Ms. Rose finally pressed for the appeal be dismissed with costs as the appeal is brought without any sufficient cause.

In rejoinder the appellant reiterated his submission in chief and insisted for the appeal to be allowed.



Now, having heard both parties, I have now to determine this appeal and the major issue for consideration is whether this appeal is merited.

In my determination of the matter, I shall be guided by the following principles of law. One, is that in civil cases, the burden of proof lies on the person who alleges anything in his favour. See rule 1 (2) of the Magistrate's Court (Rules of Evidence in Primary Court) regulations. Two, is that the burden of proof envisaged above is on the balance of probabilities. 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 (See rule 6 of the Magistrate's Court (Rules of Evidence in Primary Court) regulations and as stated in various decisions, including **Anthony Masanga v. Penina Mama Mgesi and Another**, Civil Appeal No. 118 of 2014 and **Hamza Byarumshengo v. Fulgencia Many and 4 Others**, Civil Appeal No. 33 of 2017 (both unreported). Three, under section 10 of the Law of Contract Act, parties are bound by the agreements they freely entered into.

Now, in the case at hand, it is allegedly that the respondent gave monies to the appellant for him to purchase paddy vide oral contract. The amount claimed to be given to the appellant worth is Tshs 15,668,250/=

The appellant did not honour the contract instead manipulated the monies and when asked, he denied to have been given the said money.

I have gone through the trial records and weigh the evidence tendered by both parties.

It was the respondent's evidence that after had known with the appellant and done some business transactions together, he trusted him and gave monies, to the tune of Tshs 15,668,250 for purchasing rice paddy. Unfortunately, the appellant did not heed as it was agreed. PW1, and PW3 mentioned diverse dates when the appellant took money. But interestingly, the all witnesses (Pw1, PW2 and Pw3) were from the same office but came with different versions.

There is no direct evidence from any witness who testified for the appellant to have been given money but just mentioning. No any writing as to whether on the material dates the appellant really took the stated amount, leave apart the absence of written contract, but a proof of taking money by the appellant. However, when I was totalizing the money from the list of dates mentioned to have been taken by the appellant the same did not match with what is claimed.

Worse enough, the appellant's (plaintiff's) evidence was contradictory in nature, when PW3 was mentioning on 14/2/2022 the appellant took 5,000,000/=, PW1 being the plaintiff did not mention this date. There are dates alleged that the appellant took money from the respondent mentioned by PW3, is not recognized by the PW1 the claimant i.e 28/3/2022, 30/3/2022, 5/4/2022 to mention but a few. Further PW3 also added that; "*lakini pia kuna pesa nyingine ndogo ndogo alikua anachukua*"

Prior, we are told that the sum of money was given to the appellant to purchase rice paddy and now we are told he also took other monies. This version is different from that of the PW1. It is however not known the alleged Tshs 15,668,250/= was for what business or even that money given to the appellant for expenditure are owed in, this



was?

According to **Mathias Bundala Versus Republic**, Criminal Appeal No 62 of 2004 and **Aloyce Maridadi Versus Republic**, Criminal Appeal No.208 of 2016 (both unreported), good reasons for not believing a witness includes where the witness gives improbable or implausible evidence or where the evidence of the witnesses materially contradicts the evidence of another or of other witnesses.

In such circumstances, the principle in **Goodluck Kyando**(supra) does not apply, the evidence cannot be accorded any credibility.

Mindful in civil cases, the burden of proof lies on the person who alleges anything in his favour as I have detailed herein. And that the burden of proof envisaged above is on the balance of probabilities as stated in various decisions of this Court, including **Anthony Masanga v. Penina Mama Mgesi and Another (supra)** and **Hamza Byarumshengo v. Fulgencia Manya and 4 Others, (supra)**.

It is trite law that failure to tender material evidence has the same impact as failure to call the important witnesses, in which case adverse inference can be drawn against the party failing to tender the material evidence as it is the case when there is failure to call important witnesses (See **Hemed Said Vs. Mohamed Mbilu**, [1984] TLR 114). In the current matter, there is no such tangible evidence which established that the appellant had been granted such an amount of money and for what purpose. If a person comes to a court of law and claims a thing from another person and fails to give evidence for such a claim, then he is said to have failed to discharge his legal duty of establishing the said claims. Thus, he must fail. In the current case, equally, the respondent was duty bound to establish evidence if he actually advanced the said money as claimed. In civil claim as per primary court's rules on evidence, 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 (Rule 6).

I am aware that this is the second appeal, in which this court is refrained from interfering with lower courts' concurrent findings on point of fact (see **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores v. A.H Jariwalla t/a Zanzibar Hotel** [1980] T.L. R 31 where at page 32 we said:

*"Where there are concurrent findings of facts by two courts, the Court of Appeal, as a wise rule of practice, **should not disturb them unless it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure**".*

See also the case of **Simon Kichele Chacha v. Aveline M. Kilawe**, civil appeal no. 160 of 2018. In this case, having revisited the evidence by the trial court, I am of the considered view that there was no any evidence adduced before the trial court to warrant the said award as done. It was just mere words which in law was not evidence. It is astonishing that a person can handover another an amount worth 15,000,000/= in which he expected to be refunded in the absence of any tangible evidence establishing the said transaction. If all words were evidence, then there was no such rule of evidence.



Guided by such principles, and upon scanning the testimonies of the witnesses at the trial court, I find none of proof of evidence on claims of Tshs 15,668,250/= . What was claimed before the trial Court by the respondent were special damages which needed a strict proof and not a mere mentioning. It is settled law that parties are bound by the agreements they freely entered into and this is the cardinal principle of the law of contract. That is, there should be a sanctity of the contract as lucidly stated in **Abualy Alibhai Azizi v. Bhatia Brothers Ltd** [2000] T.L.R 288 at page 289 thus:

"The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement"

I say so because, for one to be awarded with specific damage, the claimant must strictly establish so. As per itemized claims into the respondent's statements of claim, specific damage was not established. Borrowing the words of my brother **Karayemaha, J in FINCA Microfinance Bank Ltd vs Mohamed Megayu**, Civil Appeal No 26 of 2020 that, the area of damages is not a virgin one. A lot has been discussed through case laws and literatures. Legendary principles have been accentuated.

I wish, now, to borrow the words of Lord Blackburn in **Livingstone vs, Rawyards Coal Company**, (1850)5 App. Case 25 at Page39 which was quoted by Hon. Kihwelo, J. (as he then was) in **Njombe Community Bank & Another vs. lane Mganwa**, DC. Civil Appeal No.3 of 2015 atpage where it was stated that damages are:

" That sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he has not sustained the wrong for which he is now getting compensation or reparation"

In my view, therefore, damages are intended to put a party in the same position, as far as money can do so, as if his rights had been observed. Principles governing this area, as alluded above, are very clear and elaborative. The case of **Njombe Community Bank & Another vs. lane Mganwa** (supra) quoting the dictum of **McNoughten in Bolag vs. Hutchison**, (1950) AC 515 at page 525 promulgated the correct principle of law on specific damages which is universally accepted that special damages are:

"Such as the law will not infer from the nature of the act, they do not follow in the ordinary course. They are exceptional in their character and therefore, they must be claimed specifically and proved strictly"

In the case of **Zuberi Augustino vs. Anicet Mugabe**, [1992] TLR137, the Court of Appeal held that:

"It is trite law, and we need not to cite any authority, that special damages must be specifically pleaded and proved"

It must be insisted here that what is awarded by the court should not be gifts to parties but be based on established claims as per legal standards. It being a civil claim, its standard of proof is only on balance of probability and not otherwise. In the current matter, there has not been any proof by the respondent as what actual damages are entitled by the appellant following the money secured from him which the appellant is indebted.



With all the said, I must therefore conclude that this appeal was brought with sufficient cause and consequently is allowed. The decisions of the lower courts are hereby quashed and set aside.

Right to further appeal is explained

No orders as to cost.

It so ordered.

DATED at SHINYANGA this 28th day of May 2024.

F.H. MAHIMBALI

JUDGE

Dated at SHINYANGA ZONE this 28th of May 2024.



FRANK MAHIMBALI
JUDGE OF THE HIGH COURT

