

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
ARUSHA SUB REGISTRY  
AT ARUSHA**

**CIVIL APPEAL NO. 64 OF 2023**

**GODFREY MALIMA ..... APPELLANT**

**VERSUS**

**ANNA DICKSON LYATUU .....RESPONDENT**

**JUDGMENT**

*19<sup>th</sup> & 24<sup>th</sup> June 2024*

**MKWIZU: -**

The individuals involved in this legal case were previously family friends. They became acquainted in 2018 when the person appealing the judgment was introduced to the respondent by the appellant's spouse. The appellant is a former officer at Compassion International Tanzania, while the respondent is a teacher. Their relationship soured when the appellant allegedly failed to repay money borrowed from the respondent to support a project with Arusha Municipality.

The records tell it that, in 2018, the appellant approached the respondent for financial assistance to fund a project with the Arusha municipality. The respondent provided the appellant with 92,000,000/= in cash. The arrangement was that the money would be returned once the job was completed. However, the appellant failed to meet this commitment, requesting a meeting to discuss how they would tackle the issue.

Following a successful discussion, all sides agreed on an amount and a repayment timeline before signing the minutes. This schedule did not work. They then proceeded to court and reached another arrangement on August 30, 2021, duly signed by both and the magistrate but again, the appellant did not meet his responsibility. He once again requested a three-month extension to make the payment, and this was documented and signed. The appellant still did not make the payment, leading to a civil suit in which the respondent is claiming 92,000,000/=, plus general damages and the costs of the suit. The minutes held on 26/6/2020, a document with the appellant's commitment to pay dated 30/8/2021 and 29/11/2021 and a demand letter by Equality Attorneys were tendered and admitted as exhibit P1 collectively. The defendant denied the claims. The suit was concluded in favour of the respondent. The trial court was convinced that the parties had an oral contract, the appellant breached the contract, and as a result, allowed the respondent's claim of 92,000,000/= plus costs of the suit.

The appellant is not happy. He filed a grounds memorandum of appeal as follows:

1. That the trial court erred in law and facts in deciding the matter in the favour of the Respondent while the case was not proved in the standard required by the law.

2. That the trial court erred in law and facts in that it failed to put court records properly which led to an improper decision.
3. That the trial court erred in law and fact in that it determined the matter without considering the real evidence adduced by the parties thereto.
4. The trial court erred in law and fact in that it determined and decided the matter without considering that the respondent failed to call key/material witnesses as a mandatory requirement of the law.
5. The trial court erred in law and in facts in deciding the matter based on flimsy and contradictory evidence adduced by the respondent.
6. That the trial court erred in law and facts in deciding the matter in the favour of the respondent without considering the evidence adduced by the appellant.

During the hearing, the appellant was represented by Mr Ngeseja Lackton learned advocate, and the respondent had the services of Mr Edmund Ngemela also learned advocate. Mr Ngeseja began his submissions by abandoning ground no 2 with a payer to argue the rest of the grounds, that is 1, 3,4,5 and 6 collectively in which he accuses the respondent of failing to establish her claim to the required standards.

He contended that the evidence presented could not clearly show how the appellant received the claimed money faulting the respondent for failure to call witnesses to exhibit P1 to testify on how the agreement was reached or whether the appellant had ever signed the said documents. He contended that, since the respondent relied on documents containing the appellant's contested signature, she should have brought witnesses to verify the facts presented, which would have included Dickson Lyatuu, Leshiye Lengaram, and the author of the agreement. He said, the purported signature appearing in exhibit P1 is different from the appellant's signature appearing in WSD and therefore further evidence was needed to establish if at all the appellant signed the said documents or not.

This was not done, and no reasons were provided for why the witnesses of the admitted agreement were not called, leading the court to conclude that if those witnesses had been questioned, they would have presented evidence opposed to that of the respondent. He relied on three determined cases: **Sijali Juma Kocho v Republic** (1994) T.L.R 206, **Aziz Abdallah v R** (1991) TLR. 71, and **Hemedi said v Mohamed Mbilu** (1984) TLR 113. He finally prayed for the appeal to be allowed.

Mr. Ngemela on the other hand opposed the appeal. He said the defendants' defence was a broad denial without any specific protest on

the signature on the documents attached to the plaint. He maintained that the plaint submitted in court included all the documents relied upon by the plaintiff, who is now a respondent. The defendant, now appellant, got the documents with the plaint before trial. His signature was not denied in his Written Statement of Defence, and nothing was offered to deny the appellant's signature in the documents submitted as exhibits before the court. To him, witnesses are called to establish the contested matters before the court and since the issue of signature was not one of the contested points, there was no need to call witnesses to establish something that was not contested in the WSD.

He went on to say that the parties' agreement was oral, and the respondent was able to describe how he paid the appellant money. The documents presented in court were not a loan contract, but rather a commitment by the appellant to refund the respondent's money, which served to corroborate the previous oral contract between the parties. To him, this is a civil case with a balance of probability test, and the respondent successfully established her claim to the required standard. He urged the court to dismiss the appeal with costs.

Having thoroughly considered the trial court's records including the pleadings, the impugned documentary evidence tendered, the trial court's decision and the rival submissions before this court I find the key issue

between parties to be whether the claims by the plaintiff at the trial court were proved at all, specific consideration directed to lack of written contract, fraud on the part of the respondent for tendering exhibits containing the disputed appellant's signature and non-calling of individuals appearing to witness the tendered exhibits.

The issue of signature should not detain the court further. As contended, the appellant is denying all the signatures appearing on the documentary evidence admitted before the court implying fraud/forgery on the party of the respondent. The rule on the allegation of fraud in civil cases is settled. It requires to be specifically pleaded, particularised in the plaint and proved to the required standard, heavier than a mere balance of probabilities. This is the decision of the Court of Appeal in **City Coffee Ltd Vs Registered Trustee of Holo Coffee Group**, Civil Appeal No 94 of 2018(Unreported) where it was observed *inter alia* thus:

*"....In the view of foregoing, it is dear that regarding allegations of fraud in civil cases and proven and the standard of proof of fraud in civil cases the particulars of **fraud, being a very serious allegation must be specifically pleaded and the burden of proof thereof**, although not that which is required in criminal cases generally applied in civil cases, **proving the case beyond reasonable doubt it is heavier than a mere balance of probabilities**". (Emphasis added)*

I have reviewed the records, as rightly submitted by the respondent's counsel, the appellant's WSD contained a general denial without a specific protest of his signature on the documentary evidence that was attached in the appellant's plaint and more to that there is nothing serious relating to the appellant's signature was raised during the plaintiff's case. The trial court proceedings show that all documentary exhibits were admitted without objection and though represented by a learned counsel, the appellant's question during cross-examination did not touch on the validity or otherwise of his signature on the admitted documents or anything relating to forgery. The forgery allegations were brought to the court records later during the appellant's defence. And even at this stage, he did not go further to establish the said forgery. He just raised the issue and left it for the court to decide.

Guided by the above authority of the Highest Court of the land, I am satisfied that, the issue of fraud was improperly brought into the records, belatedly during defence and without proof and therefore insignificant to the matter.

Just to add to the above, the contested signature was part and parcel of documents attached to the plaint containing the appellant's commitment to pay the claimed money some of which he recorded. I would have expected in such a situation, the appellant to come very clear, if at all the

documents contain any forgery, with concrete evidence establishing to the required standard that he was never involved in authoring the said documents. This was not done and therefore his lamentation is worth ignoring.

Next is whether there was any handover of the claimed money to the appellant. I understand that no written contract was tendered in court, but PW1 was able to explain how she met the appellant how they transacted and all the promises that the appellant gave undertaking to repay the money at issue. Looking at the entire transaction and the evidence given including the appellant's commitments, I retain no doubt that the appellant utilised the money in view of repaying but failed to do so.

On whether it was necessary to call the persons who had witnessed the commitment by the appellant to repay the money tendered in court, I think not because, PW1 evidence plus the documentary evidence tendered were able to establish the claim. This being a civil matter, the plaintiff's duty was to prove the claim in the balance of probability. She, in my view, managed to so establish. I 'am conscious of the position taken by the Court of Appeal in the cases cited by the appellant's counsel that the non-calling of a material witness without reasons would entitle the court to draw an inference adverse to the failing party. However this



principle is not applied arbitrarily, it is only applicable where the evidence by the witnesses omitted is in such a way that if not given would leave the evidence unclear. This is why section 143 of the Evidence Act (Cap 6-RE 2022 makes it clear that it is not several witnesses that are important but the credibility and weight of the called witnesses. In this case, the respondent's evidence was credible to support the trial court's verdict.

The appellant's appeal is devoid of merit. It is hereby dismissed in its entirety with costs. Order accordingly.

**DATED at ARUSHA this 24<sup>th</sup> June 2024**



*E.Y. Mkwizu*  
**E.Y. Mkwizu**

**JUDGE**

**24/6/2024**

**COURT:** Right of Appeal explained

*E.Y. Mkwizu*  
**E.Y. Mkwizu**

**JUDGE**