IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 720 OF 2023

(Appeal from the decision from judgment and decree District Court of Ilala at Kinyerezi in Civil Appeal No. 26 of 2023 before Hon. R. Lyana SRM Dated 13th December 2023)

FILOMENA NGONYANI ..... APPELLANT

VERSUS

ZAINAB SHABAN ..... RESPONDENT

JUDGMENT

28th May & 26th June, 2024

MWANGA, J.

This is a second appeal, a case of significant importance. It originated in the Primary Court of Ukonga in Civil Case (Madai) No. 21 of 2023, where the respondent filed a suit regarding unpaid money to the tune of Tshs. 1,600,000/=. Upon the conclusion of the trial, the court awarded the respondent a specific claim of Tshs. 1,600,000/= as prayed for. In its reasoning, the trial court held that the appellant proved the

case to the required standard, and the amount claimed was given to the appellant by the Respondent.

However, the respondent was not content with the decision and thus appealed to the District Court of Ilala. The District Court upheld the trial court's decision, finding no contradictions among the Plaintiff's witnesses and considering the evidence of both parties, especially the fact that the Plaintiff's evidence was not cross-examined.

Feeling aggrieved with the decision, the Appellant has appealed against the decision of the District Court to this court, presenting the following grounds for the appeal: -

1. The learned magistrate erred in law and fact in holding that SM1's evidence of how the claimed debt accrued up to 1,6000,000/= was sufficient without showing how the calculation of the said accrued amount was reached.
2. The learned magistrate, in a fair and just assessment, erred in law by holding that the trial magistrate weighted the Appellant's evidence in Civil case No. 21 of 2023. The decision of the trial court did not consider the rules of balance of probabilities in civil proceedings or the principles of burden of proof.

3. The learned magistrate erred in law and fact by failing to analyze the evidence of SM1 in Civil case No. 21 of 2023 in the Primary Court of Ukonga, Ilala District, dated 05th April 2023, which led to the wrong decision.

The facts giving rise to this appeal are that the respondent claimed to have given the appellant Tshs. 1,600,000/= on various occasions. According to the record, in May 2018, the respondent borrowed the Appellant Tshs. 350,000/=, which she promised to pay in one week, but it was in vain. In August 2018 Appellant was given Tshs. 200,000/= by the Respondent to keep it. In the same month, the Appellant borrowed Tshs again. 100,000/- from the Respondent, but she did not repay the money. Again, the Respondent borrowed the Appellant "VICOBA" Money Tshs. 750,000/=, and she was owed money Tshs 200,000/=, and the Respondent paid on her behalf. Hence, the total amount claimed by the Appellant to have been given to the Respondent is Tshs. 1,600,000/=.

The appellant had one witness to defend her case, and the Respondent had three witnesses at the trial court. The matter was fixed and will be heard through written submission during the hearing. Both parties complied with the order and filed their written submission as scheduled. The appellant enjoyed legal representation from Mr. Eliezer

Msuya, the learned counsel. On the other hand, the respondent was in person.

In the 1st ground of appeal, the appellant contended that the learned magistrate erred in law and fact in holding that evidence produced by SM1 on how the claimed debt accrued up to 1,6000,000/= was sufficient without showing how the calculation to the said accrued amount was reached. Counsel for the Appellant submitted that the calculation used to get the claimed amount was not the same as what was provided in the judgment since the judgment itself does not stipulate how the amount was reached to the claimed amount. He referred to Paragraph 2 of page 1 and Paragraphs 1 and 2 of page 2 of the Judgment of the primary court. He further submitted that it involved someone, Salome, who was said to be given some money, but she was not called a witness. He prayed this court to disregard the lower court decisions, which granted the claims made by the respondent.

Per contra, the respondent submitted that the trial court was right in its decision, and SM1 gave direct evidence on how the claimed debt accrued up to Tshs. 1,600,000/=. He submitted that the testimony of the SM1 was never cross-examined to the said evidence in the trial court. He cited the case of **Goodluck Kyando vs. R [2006] TLR 365**

Damian Ruhele vs. R, Criminal Appeal No. 501 of 2007 (unreported), **Nyerere Nyague vs. R,** Criminal Appeal No. 67 of 2010 (unreported), and **Bomu Mohamed vs. Hamisi Amisi Amiri Civil Appeal No. 99 of 2018.** He prayed the appeal be dismissed.

In rejoinder, counsel for the respondent submitted that the dispute in the appeal was that the calculations to be relied upon to reach the claimed amount were not evaluated, and the trial court proceeded to grant the same. He distinguished the case of **Nyerere Nyague vs Republic (supra)**. He stated that if the case were to be taken into consideration by the trial court, the granted amount could never stand the same. He further noted that SM1 did not see the importance of calling Salome, who is sad to have been given the money, as a witness; this brings doubt to the reality of facts produced by SM1.

Having passed through the trial court's and 1st appellate court proceedings and respective submission of the parties, it can be observed that the dispute between the parties in the appeal is aligned with the calculations of the amount given to the Appellant. After a thorough perusal of the trial court records and submission of the parties herein, I have noted that the appellant is the one to whom the Respondent gave

the money. The amount given was clearly shown in the trial court judgment, and for ease of reference, I quote;

"SM1 anasema kuwa alimpa pesa Mdaiwa kwa vipindi tofauti tofauti, ambapo mara ya kwanza alimpa shilingi ***350,000/=*** *hakurejesha, akarudi tena na akapewa shilingi* ***100,000/=*** *siku ya kuvunja VICOBA SU1 akawa hana hela kabisa alikuwa anadaiwa shilingi 5,000,000/= alikuwa na vitabu, walikuwa na kikoba cha jumamosi ambapo kwenye kikoba hicho kulikuwa na pesa shilingi* ***200,000/=*** *akampa SU1 amshikie akaondoka nazo akachukua hela shilingi* ***750,000/=*** *na yeye akaongezea shilingi 250,000/= jumla ikawa 1,000,000/= akampa Salome*

SM1 anaongeza kuwa walicheza mchezo ***200,000/=*** *akapokea SU1 jumla anamdai shilingi* ***1,600,000/=.*** *Ushahidi wa SM1 uliungwa mkono na Ushahidi wa SM2 na SM3. Mwisho wa shauri upande wa Mdai".* ***(emphasis is mine)***

The trial court's quoted judgment clearly shows how much money was given to the Appellant. The 1st appellate court also recognized this, and for ease of reference, I wish to quote as follows-:

"On the 1st ground, the respondent, SM1, gave direct evidence on how the claimed debt accrued up to Tshs.

1,600,000/= The testimony of SM1 was never cross-examined touching the said debt as seen in the trial court record, which speaks for itself".

Because of the above-quoted decision of the 1st appellate court, it is deplorable that the Appellant had a right to cross-examine the testimony of the Respondent and his witnesses but never used that opportunity to cross-examine the same. The court was correct, holding that failure to cross-examine a witness on a particular point/issue leaves his evidence unchallenged, as he is deemed to have accepted the matter. See the cited cases of **Goodluck Kyando vs. R [2006] TLR 365 Damian Ruhele vs. R,** Criminal Appeal No. 501 of 2007 (unreported), **Nyerere Nyague vs. R,** Criminal Appeal No. 67 of 2010 (unreported).

The Appellant's argument that one Salome was not called as a witness creates doubt on the reality of the facts by SM1. This argument is misconceived since SM1 brought SM2, who confirmed that the Appellant did not pay back the respondent her money, and SM3 testified that she knows the appellant as the teacher. The respondent is the secretary of VICOBA, and the appellant did not cross-examine the same. In that regard, this grounds for appeal fails.

Regarding the second ground of appeal, the appellant contended that the learned magistrate erred in law by holding that the trial magistrate weighted the Appellant's evidence in Civil case No. 21 of 2023. The trial court's decision did not consider the rules of balance of probabilities in civil proceedings or the principles of burden of proof. Counsel for the Appellant submitted that the trial court disregarded the evidence of SU1 and that he does not owe the Respondent money. The trial magistrate argued that SM1 proved the case on a balance of probabilities, but he did not show anywhere that SM1 managed to prove her case. He submitted that all the SM1 witnesses produced hearsay evidence, and no exhibit was tendered to show the amount of money granted to the Appellant. He cited Section 112 of the Evidence Act Cap 6 R.E 2022 and Regulation 6, 7, and 10 of GN 66 of 1972, The Magistrate Courts (rules of evidence in primary court) regulation. Also, He cited the case of **Barelia Kirangirangi vs. Asteria Nyalwamba,** Civil Appeal No. 237 of 2017 (unreported), **Eunice Mashaija Noventh and Another vs. Ansibeth Nkete,** Land Case 101 of 2020.

In reply, Respondent submitted that he and his witnesses proved the debt claimed, and the Appellant failed to show the contradictory evidence as claimed. He submitted that the Appellant's evidence was

considered as she was the sole witness in the defense case at the trial court. As SM1 testified, she knows the appellant as her neighbor and gave her a total of Tshs. 1,600,000/= via VICOBA, while SM2 testified that the appellant did not repay the Respondent her money. SM3 knows the appellant as a teacher and the Respondent as a secretary of VICOBA. He further submitted that there were no contradictions, as complained by the Appellant. He submitted that the Respondent's evidence was heavier than the Appellant's. He cited **Hemedi Said vs Mohamed MBilu (1984) TLR 113** and the Evidence Act.

In rejoinder, counsel for the appellant submitted that the required standard of proof was on the balance of probabilities and that the trial court did not satisfy the law requirement. He submitted that SM1 produced evidence and mentioned VICOBA and a material witness called Salome, but she never called her as a witness to prove the alleged facts. SM1 brought in court SM2 and SM3, who had nothing to tell the court about the particular transactions and installments.

After a thorough perusal of the trial court records and submission of the parties herein, I have noted that the appellant at this ground of appeal connotes that she was challenging the primary court's decision. This is a second appeal, and as a matter of principle, the court has held

that in a second appeal, the court has to be cautious about varying the findings made by the court below. That was the position in the case of **Director of Public Prosecutions Vs. Norbert Enock Mbunda**, Criminal Appeal No. 108 Of 2004(Unreported) where at page 5 the court had this to say: -

> ***"Needless to repeat, this is a second appeal. In a second appeal, the court is always cautious to reverse findings of fact made by courts below unless they are, on the face of it, unreasonable or perverse". (Emphasis is mine).***

Indeed, the present appeal is second. The issue now is whether the varied decision of the district court is, on the face of it, unreasonable or perverse. When giving the decision, the district magistrate court had the following view: -

> ***"To start with No. 2 basing onnthe complaint of contradiction on record the respondent had three witnesses SM1 (the respondent) testified that she knows the appellant as her neighbour, in total she gave the respondent Tshs. 1,600,000/= via VICOBA, which is the claimed debt. SM2 confirmed that the appellant did not***

pay back the respondent her money. SM3 knows the appellant was the teacher and the respondent as a secretary of VICOBA. Having gone through the said testimonies, I did not find any contradictions as complained by the appellant".

I was concerned about ground three on the complaint, which states that the respondent's defense was not considered. I have reviewed the entire trial court's judgment, and on the second and third pages, the trial magistrate considered the respondent's evidence.

On the first ground, the respondent, SM1, gave direct evidence of how the claimed debt accrued up to Tshs. 1,600,000/=. SM1's testimony was never cross-examined regarding the said debt, as seen in the trial court record, which speaks for itself.

The above-quoted district court decision shows how the district court has managed to consider the trial court proceedings in making its decision. The primary court decision considered both parties' evidence and found that the Respondent's evidence was heavier than the Appellant's. For ease of reference, I wish to quote;

"...hivyo basi kulingana na Ushahidi uliotolewa na upande wa mdai, ni wazi kuwa dai limethibitika kwa kiwango cha

uwezekano n ahata mahakama hii ilipopitia Ushahidi wa upande wa mdaiwa imeona kuwa utetezi wake hauna uzito ukilinganisha na Ushahidi uliotolewa na upande wa mdai na kwa utetezi wa mdai una uzito kuliko wa mdaiwa chini ya Fungu la 6 la kanuni na Ushahidi katika Mahakama za mwanzo..."

Given the above, I am right to hold that the above decision reflects that the respondent has proved her case to the standard required, as the duty to prove the allegations was on the part of the appellant on the balance of probabilities. To discharge such duty, the appellant managed to bring SM2 and SM3 to testify on his behalf to the trial court on how the appellant did not pay back the Respondent's money and how they knew the appellant and Respondent. In the case of **Paulina Samson Ndawavya Versus Theresia Thomasi Madaha**, Civil Appeal No. 53 of 2017, the Court of Appeal observed that:-

"It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap. 6 [R.E 2002]. It is equally elementary that since the dispute was in a civil case, the standard of proof was on a balance of

probabilities. This simply means that the Court will sustain such evidence which is more credible than the other".

Based on the above, the trial court held that the Respondent had proven his case beyond the required standards. The witnesses testified that the appellant was given the claimed debt, but the appellant did not repay the said money to the respondent. Therefore, this ground of appeal also fails.

The third ground of appeal, the Appellant contends that the learned magistrate erred in law and fact by failing to analyze the evidence of SM1 in Civil case No. 21 of 2023 in the Primary Court of Ukonga, Ilala District, dated 05th April 2023, which led to the wrong decision. Counsel for the appellant submitted that the trial Magistrate failed to analyze the evidence produced to her. SM1 produced evidence not relating to the claim, and the Magistrate granted her with the prayer. He further submitted that the magistrate did not analyze SM1 evidence; she did not bother to ascertain the calculation of the accrued claimed amount.

In reply, Respondent submitted that the Appellant's evidence was well analyzed and considered as she was the sole witness on record in

the trial court, and SM1 had three witnesses, and their evidence was not cross-examined.

In rejoinder, counsel for the Appellant submitted that SM1 produced facts unrelated to the claim, and the witnesses did not tell the court how the claimed amount was reached.

Having passed through the 1st appellate and trial court proceedings and the parties' respective submissions, I have noted that the appellant was given the amount claimed as SM2, and SM3 established it at the trial court. An appellant argues that the magistrate failed to analyze the calculation since SM1 did not state the specific mathematics. In the 1st appellate court, the Learned Magistrate has shown how the evidence was examined, as seen in the judgment's 4th and 5th pages. The magistrate has demonstrated that the evidence of the SM1 and her witnesses were not cross-examined. During cross-examination, the Appellant did not question the respondent on the truthfulness or correct version of the respondent and her witnesses' testimonies. That means the same is true of being admitted in the case of **Goodluck Kyando Vs. Republic, [2006 TLR] 363,** the court held that failure to cross-examine witnesses leaves the evidence unchallenged. That was also the position in the case of **Damian Luhele**

Versus Republic, Criminal Appeal No. 50 of 2007, quoted in the case of **Yosefu Timotheus Mapunda Vs. Republic, Criminal Appeal No. 53 of 2022**(Unreported), where it was held that:-

> ***"It is trite law that failure to cross-examine a witness on an important Matter ordinarily implies the acceptance of the truth of the witnesses' evidence.'***

Given the above, I consider the District Court's findings reasonable or perverse. There was justification for upholding the primary court's decision, and the evidence was well analyzed.

In light of the above discussion, I profoundly believe that the appeal lacks merit. Therefore, it is dismissed with costs, and the district court's decision is upheld.

Order accordingly.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY

H. R. MWANGA

JUDGE

26/06/2024