THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

PC CIVIL APPEAL NO. 10 OF 2021

(From the Decision of the District Court of Hanang Originally from Civil suit No. 9 of 2019)

LEONARD MUHALE.....1ST APPELLANT

EMMANUEL LEONARD..... 2ND APPELLANT

VERSUS

TUMAINI SEBASTIANI .....RESPONDENT

JUDGMENT

12th August & 30th September 2022

TIGANGA, J.

The appellants being dissatisfied with the decision and decree of the District Court of Karatu at Arusha preferred his appeal to this Court on five grounds as follows: **One** that, the appellate court gravely erred in deciding the case in favour of the respondent while the evidence was weak and he did neither bring a witness nor exhibit, any document to corroborate his testimony. **Two** that, the appellate District Court erred in finding that, there was no cross examination conducted by the appellant against the respondent while the respondent was cross examined by the respondent. **Three** that, the appellate District Court

misdirected itself in holding that the claim by the respondent was not disputed by the appellants. **Four** that, the appellate District Court erred in holding that, the evidence of a single witness is sufficient without taking into consideration any other corroborative evidence available. **Five** that, the appellate District Court misdirected itself in holding that, the inconsistencies by the respondent and his witness was negligible not likely to invalidate the decision of the trial court.

Briefly, as gathered from the record, the background of the matter is simple to understand it goes as follows:

The then plaintiff in the trial court (Now the respondent) instituted a civil case in the trial court claiming the amount of money worthy two million eight thousand hundred twenty-five thousand and five hundred Tanzania Shillings (Tshs. 2, 829, 5000/=). The amount is claimed to have been given to the 1st appellant who by then is alleged to have been in prison custody for Criminal Case No. 191 of 2014. It is also alleged that the said money had been taken from the respondent to the 1st appellant by the 2nd appellant and one Wilfred Leornard who was the 2nd respondent in the trial court. These two also are the sons of the 1st appellant. The facts show that, the said money was given in instalments for different purposes including but not limited to payment for remove

order. It was counted from the bags of maize until when it reached the claimed amount. Thus, the money claimed was calculated both, in cash money and the maize given. During hearing of the case in the trial court, the respondent herein, successfully prayed to the court to withdraw the case against Wilfred Leonard. The court accepted consequent of which the claim against him was withdrawn. Therefore, the case remained only with Leonard Muhale and Emmanuel Leonard who are the appellants in this Court.

Upon hearing the case on merit, the trial Primary Court found that the case was proved against the 1st appellant alone. That findings did not satisfy the appellant who decided to appeal to the District Court of Hanang at Katesh herein after refereed to as the 1st appellate court where the decision of the trial court was upheld. Hence, this appeal.

Before this court the with leave of the court, the appeal was argued by way of written submission. The appellants were both assisted by Mr. Patrick J. Ami, learned advocate while the respondent appeared himself, unrepresented.

Upon taking the podium, Mr. Ami submitted that, stating with ground 1 where he said that, there were no evidence to prove the case against the appellants. That the cause of action was done through the

alleged oral contract entered on 25th October, 2014. That on that material date, the respondent with Thomas Muhale and Wilfred Leonard visited the 1st appellant at the prison of Babati where he was incarcerated for criminal charges. Mr. Ami said further that, while at the prison the alleged agreement was concluded and the respondent was alleged to credit the amount of 439, 500/= and 18 bags of maize to the 1st appellant.

The counsel further submitted that, at the trial court the respondent did not bring Thomas Muhale or Wilfred Leonard who where with him when the alleged contract between the 1st appellant and the respondent was interred to testify. Instead, he brought Ezekiel Uche who was not there at the time when the agreement was concluded.

Mr. Ami contended that, when cross examined by the 1st appellant the respondent did not mention the number of bags of maize the 1st appellant took from the respondent. That, the amount of 139,500/= written in a trial court proceeding was not witnessed by Thoma Muhale and Wilfred Leonard.

On the second ground, Mr. Ami agued that, there was contradictory evidence in the case of the respondent. He pointed out such discrepancies as to be that, the 1st appellant stated that, he

borrowed 100,000/= from the respondent in exchange for the lease of one acre of agricultural land and not 439,500/=. Also that, the evidence of Ezekiel Uche and that of the respondent contradict each other on the number of maize bags. That, while the respondent said that the 1st appellant took only two bags, Ezekiel Uche, his witness said he took only five tins of maize. Moreover, the counsel, argued that, the evidence of a single witness must be corroborated by some other evidence and therefore, the courts below must have been taken note and serious on it. lastly that, the case was not proved on the standard required.

Counteracting, the respondent argued that, all of the grounds submitted upon by Mr. Ami are new not sufficing being decided upon by the Court. To buttress his contention, he cited the case of **Godfrey s/o Ndolomi versus Jenirodha d/o Alimasi,** Misc. Land Application No. 26 of 2019, HC at Sumbawanga (unreported). Therefore, he prayed to the court to dismiss them all with costs.

Alternatively, the respondent on the first ground argued that, there is no particular number of witnesses required to prove any fact. To fortify his contention, he cited Section 143 of the Evidence Act, [Cap. 6 R.E 2019] and the case of **Yohanis Msingwa versus The Republic** (1990) TLR 148. That every witness is entitled to credence and must be

believed unless there are good and cogent reasons. To this, the case of **Goodluck Kyando versus The Republic** (2006) TLR 363 also was pointed out.

On the ground of written contract, the respondent submitted that, oral contracts are contracts recognized by the law under section 10 of the Law of Contract Act, [Cap. 345 R.E 2019].

On grounds two and three, the respondent argued them jointly. That, upon the court affording parties opportunity to present their case, it is upon them to cross examine on important issues to build up their case. To cement on the point, he cited the case of **The Republic versus Frank Charles @ Fataki**, Criminal Session No. 26 of 2018. HC at Arusha (unreported). This case among other things observed that, a party who fails to cross examine on important issue is taken as accepting it. thus, the appellants being given an opportunity to cross examine and fail to act upon it, is considered to have accepted such facts and they are estopped from asking the court to disbelieve in it.

On grounds four and five, it is not clear whether the appellants' counsel had abandoned them or otherwise, the counsel said. However, he merged them in reply. In his reply, the respondent reiterated the

position of a single witness that, the law does not require corroboration merely because, the witness was alone.

For reasons best known to the appellants and their advocate, they did not file rejoinder.

After looking into the submissions of both parties, the grounds this court is invited to determine shall be dealt with all though some jointly due to similar composition and demand save for ground 4 which is of a single witness's evidence being relied upon without corroboration. I am with this view owing to the reason that, the ground is new in this appeal. It had never been delt with in the first appellate court. See the case of the case of **Godfrey Wilson versus The Republic,** Criminal Appeal No. 168 of 2018. This is because, the second appellate court cannot inter into the mind of the first appellate court and assume as to what it could have been decided in case, the ground would have been presented before it.

The second ground of appeal which is of cross examination. The counsel for the appellants did not point out at what page of the trial court proceeding the 1st appellant cross examined the respondent which in his reply he is saying did not help anything. However, I have taken time to peruse the trial court proceeding specifically under page 6 of the

typed one. What I have noticed therefrom is that, the said 1st appellant cross examined the respondent on one issue which is about maize. When cross examined by the then 2nd respondent in the trial court, the respondent replied that, he took only two bags of maize from him.

However, the witness of the respondent one Ezekiel Uche during is testification in court said, the maize was taken from his store and that maize belongs to the respondent. that what was taken there, at first it was one tin of maize and letter after one week the then 3rd respondent took the remaining four tin to make the number of tins of maize to be five (one bag). In fact, the appellant did neither cross examine the respondent nor his witness on the amount of money at the tune of 439,500/=. As rightly submitted by the respondent and argued by the appellate district court in its judgment, failure to cross examine on important issue renders the said issue to have been accepted. on that the Court of Appeal of Tanzania in the case of **Emmanuel Saguda @ Sulukuka and Another versus the Republic**, Criminal Appeal No. 422 "B" of 2013 (unreported) it was observed that:

> *"It In Browne v Dunn [1893] 6R. 67, H.L, it was held that a decision not to cross-examine a witness at all or on a particular point is tantamount to an acceptance of the unchallenged evidence as accurate, unless the*

testimony of the witness is incredible or there has been a clear prior notice of the intention to impeach the relevant testimony."

As said, failure by the appellants to cross examine the respondent and perhaps his witness on the issue of money borrowed from the respondent is tantamount to acceptance that, truly it was borrowed. Therefore, this ground is dismissed.

On the ground of corroboration of the evidence of the single witness, as rightly argued by the respondent, it does not require a specific number of evidence to prove the case. even a single witness can do so and the court if satisfied and believed the evidence and the witness to be credible may make its finding basing on it. in the case of **Hamis Mohamed versus The Republic,** Criminal Appeal No. 297 of 2011 (Unreported), the Court of Appeal of Tanzania held:

"This issue needs not detain us. The law is clear. In terms of section 143 of the Evidence Act, Cap 6 R.E. 2002, there is no specific number of witnesses required for the prosecution to prove any fact. See ***Yohanes Msigwa v R*** *(1990) TLR 148. What is important is the quality of the evidence and not the numerical value".*

Thus, with such authority of case law, though I am aware that the Evidence Act (supra), Does not apply in matters originating from primary

courts, the ground raised by the appellant remains of no value to be sustained.

The remaining grounds 1, 2 and 5 are all of evidence analysis. The grounds suggest that the trial court and the appellate district court did not properly evaluate the evidence on record and thus reached to erroneous decisions. I have gone through the evidences and records of both subordinate courts with kin. Without prejudice to the generality that, this court being of the second appellate court should not interfere with the concurrent findings of both subordinate courts save, under certain circumstances where the court sees the matter being prejudicing the parties by not warranting good end of justice. This principle is enshrined in various decisions of the courts of record. One among them is the case **of Ramadhani Hamisi versus The Republic,** Criminal Appeal No. 121 of 2017 (Unreported) the Court of Appeal observed that:

> *"This Court as a second appellate court, will not interfere with the findings of fact of the courts below unless there is a misapprehension of evidence by misdirection or nondirection or when it is clearly shown that there has been a miscarriage of justice or violation of some principles of law or procedure".*

However, In his testimony, the respondent is testifying that, he is suppose to be paid 18 bags of maize. When cross examined by the then 2nd respondent in the trial court he said, only two bags were taken from him. Also, his witness Ezekiel Uche said at first only one tin of maize was taken from his store where the maize of the respondent is store. And also that, after a week the remaining four tins of maize were also taken by the 1st appellant's son. There is nowhere on record the 18 bags of maize have been proved. Probably the respondent is assuming because the time is long passed now without being paid back his three bags of maize proved to have been taken by the 1st appellant, would have been multiplied until the filing of the case.

In my view, if at all the assumption is right, the claim of the alleged multiplied bags of maize are not properly claimed. The court should not have relied on assumed facts. The respondent was required to prove to the standard of balance of probability. In the event therefore, that is the only fact this court has seen irregular to be acted upon. The remaining are undisturbed as the evidence was at such extent clearly evaluated and analyzed.

From the foregoing analysis, I hereby vary the 18 bags of maize to 3 bags which are proved to have been taken by the 1st respondent. The

remaining decision and orders of the subordinate courts are undisturbed. The appeal is allowed to such said extend. Parties to bear their own costs.

It is accordingly ordered

DATE at **ARUSHA**, this 30th day of September, 2022

J. C. TIGANGA

JUDGE