

TANZANIA / JUDGMENT

MIYEDU CIVIL APPEAL NO

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA DAR ES SALAAM SUB-
REGISTRY AT DAR ES SALAAM CIVIL APPEAL NO.12494 OF 2024 (C/f Civil Case No. 103 of 2021 in
the court of the Resident Magistrate of Dar es Salaam at Kisutu) CYPRIAN MUHOJA
MIYEDU..... APPELLANT VERSUS MERCI LORNA
JONATHAN..... RESPONDENT

JUDGMENT

Date of last order: 14-8-2024 Date of Judgment: 13-11-2024 B.K. PHILLIP, J The appellant herein
lodged this appeal to challenge the judgment of the Court of the Resident Magistrate of Dar es
Salaam at Kisutu on twenty-one

- (21) grounds of appeal. The same can be conveniently summarized into the following grounds of
appeal; i
- i) The trial court erred in law and fact by failing to analyze and evaluate the evidence adduced
by the parties, resulting in an erroneous decision. ii) The trial court erred in law and fact by
failing to note that there was no oral agreement between the parties and that a written
agreement supersedes oral agreement. iii) The trial court erred in law and fact by failing to
note that when the court rejects to admit an exhibit, it cannot re-admit it later on as it
becomes functus officio. iv) The trial court erred in law and fact in awarding general and
specific damages, and interests on specific and general damages to the respondent contrary
to the law.
- v) The trial court erred in law for condemning the Appellant to pay the case costs without
giving reasons. A brief background to this appeal is that the respondent sued the appellant
for breach of contract. It was the respondent's case that in August 2019, she agreed with the
appellant to engage in a business of selling maize jointly. 2 She gave the appellant a total sum
of Tshs. 45,000,000/= as her contribution for the capital for their business aforesaid. In
September 2019, she had an emergency that required money to resolve it. Thus, she asked
the appellant to give back to her Tshs. 10,000,000/= out of the capital she contributed to the
business. The appellant gave her the money she requested through bank transfers. In
December 2019, the appellant informed her that the capital she invested in the business
generated a profit of Tshs. 15,000,000/=. After that, she requested the appellant to give her

the profit (Tshs. 15,000,000/=), but the appellant did not heed her request. Following the appellant's non- cooperation, she decided to pull out all her capital and profit from the business. Thus, she demanded the appellant give her all her money, which was Tshs.50,000,000/=. She instructed her Advocate to write a demand letter to the appellant, which was well received, and the appellant's advocate responded in writing on behalf of the appellant by acknowledging that the appellant is indebted to the respondent to the tune of Tshs.50,000,000/=. However, the appellant requested the respondent accept the loss since their business had not been successful due to the Covid-19 pandemic and other misfortunes that befell the appellant during their business. Thus, the appellant did not pay the respondent her money. At the trial, the court heard 3 the case on merit and finally entered judgment in favor of the respondent herein, hence this appeal. This appeal has been heard through written submissions. The learned advocates, Richard Mathias Kinawari and Themistocles Laurian Rwegasira, appeared for the appellant and respondent, respectively. Starting with the first ground of appeal, Mr. Kinawari's submissions were to the effect that exhibit P6 (bank statement) does not show the sum of Tshs. 22,000,000/= alleged transferred by the respondent to the appellant's Bank account. Thus, the court's findings that the money was transferred to appellant's bank account are baseless. Further, Mr. Kinawari argued that though the appellant denied having engaged an Advocate to communicate with the respondent, in its judgment, the trial court relied on exhibit P3 allegedly that it was from the appellant's counsel. At the same time, the Respondent did not call the advocate who prepared that letter to testify in court, and that letter does not bear the appellant's signature to prove his endorsement. On this point, Mr. Kinawari argued that the Court shifted the burden of proving that the appellant's advocate wrote Exhibit P3. The respondent who relied upon Exhibit P3 had 4 to prove who prepared Exhibit P3. To the contrary, the trial court ruled out that the appellant was obliged to bring to court the advocate allegedly prepared Exhibit P3. About Exhibit P6 (the bank statement), Mr. Kinawari contended that when cross-examined, PW-2 failed to prove her assertion that she was employed by CRDB bank. Her credentials and testimony were questionable. Therefore Exhibit. P6 ought to have been disregarded by the trial court. He pointed out that section 78 (1) (2) of the Evidence Act, [Cap.6. R. E 2019] prohibits admission in evidence of a banker's book unless the same is proved to be the correct book used at the time of the making of the entry in the usual and ordinary course of business and that the book was in the custody or control of the bank. Such proof may be given by a partner or officer of the bank. In this case, PW-2 failed to prove that she works at CRDB Bank, thus affecting the admission of Exhibit P6, and the same ought to be disregarded, contended Mr. Kinawari. Further, Mr. Kinawari argued that the trial court erred for failure to appreciate the spirit and the principle of the sanctity of a contract while analyzing the contents of the agreement between the appellant and the 5 respondent (Exhibit P1), since it had all attributes of a partnership agreement. No clause/ term in that agreement shows that the respondent lent the appellant the money claimed. Referring this court to item (iii) of Exhibit P1, Mr. Kinawari contended that both parties contributed to the capital for the business. What was agreed to be distributed was the profit generated out of business, which the respondent admitted having received Tshs. 10,000,000/= from the

appellant. He argued that even if, for the sake of argument, it is assumed that the appellant and the respondent entered into a loan agreement, there is no clause in the contract indicating when the amount of money allegedly lent to the appellant was supposed to be paid back. The amount of money indicated in exhibit P1 is Tshs. 25,000,000/=, it is not Tshs. 35,000,000/=, or Tshs. 45,000,000/= or 50,000,000/=, insisted Mr. Kinawari. To cement his arguments, he cited the case of Kinondoni Municipal Council & Another Vs. Oysterbay Villa Limited, Civil Appeal No. 152 of 2022 (unreported). He was emphatic that once parties have freely agreed on their contractual terms, it is not open for the courts to change those terms to which parties have agreed. Nonetheless, where there is a dispute about the interpretation of the agreement, the starting point is the words used in the agreement, and then the parties' intention is ascertained. He cited the case of Francis Vicent @ Mahimbo Vs. The National Microfinance Bank PLC Civil Appeal No. 120 of 202 (unreported), in which the court held that parties are bound by their agreements. He contended that the trial court's finding that the respondent had advanced a loan to the appellant was unfounded. Mr. Kinawari argued that there is nowhere in the pleadings indicating that there were other terms of the contract were agreed on orally. He insisted that parties are obliged to give evidence within the ambit of the pleadings. There is nowhere in the written statement of defense that the appellant admitted there were other terms agreed orally apart from the ones indicated in the contract. He contended that the trial court's finding in issue No.2 that the parties agreed to conduct the business of selling maize, whereas the same is not reflected in Exhibit P1, was contrary to the contents of paragraph 4 of the plaint and paragraph 2 of the written statement of defense. He insisted that parties are bound by their pleadings. He cited the case of Richard Kigaraba vs Jonas Laurent & Others Civil Appeal No. 377 of 2019, (unreported). 7 About the 2nd ground of appeal, Mr. Kinawari submitted that any party who signs a contract or agreement should be conscious and cautious of what he or she is committing herself/himself to. Once it is shown, as in this case, that the agreement was reduced into writing, then in terms of Section 101 of the Evidence Act, [Cap. 6. R. E 2019], a party to such a contract cannot adduce oral evidence to contradict, vary, add, or subtract from its terms. To cement his arguments, he cited the case of Nuru Finance & Business Services Co. Ltd vs Benjamin Adamson Masuba, Civil Appeal No. 284 of 2020 (unreported). He argued that in this case, no witness was called to testify on the existence of oral agreement. Thus, the respondent's allegations that she gave the appellant a total of Tshs. 45,000,000/= and the court's findings that the aforesaid Tshs.45,000,000/= was given to the respondent relying on the allegedly oral agreement is erroneous. Concerning the 3rd ground of Appeal, Mr. Kinawari faulted the trial court for admitting Exhibit P6 after it had been rejected at the beginning without considering that, once the document is rejected, it cannot be admitted as the court becomes functus officio. He cited the case of Oscar Karsan Kanji Vs. Abdallah Hassan Civil Appeal No. 9 of 2020 (unreported) to cement his argument. 8 On the fourth ground of appeal, Mr. Kinawari argued the respondent did not prove which clause in Exhibit P1 was breached by the Appellant. Hence, the respondent was not entitled to be awarded Tshs. 10,000,000/= in the absence of proof of breach of terms of the agreement. The award contravenes Section 73 of the Law of Contract Act, [Cap. 345. R. E 2019]. The award

contradicted the principles governing such damages, contended Mr. Kinawari. He argued that since it was the trial court's findings that there was no partnership between the parties herein, and considering his observation that there was no term of the agreement breached, the trial court erred to award damages to the Respondent. To cement his arguments, he cited the case of Anthony Ngoo & Another Vs. Kitinda Kimaro Civil Appeal No. 25 of 2014 (unreported). Concerning the fifth ground of Appeal, Mr. Kinawari argued that in the absence of reason for awarding costs of the case to the Respondent, then that part of the decision is nullity for contravening the law. In rebuttal for the first ground of appeal, Mr. Rwegasira argued that the appellant is disputing the transfer of Tshs. 22,000,000/= into his Bank account now, while he could contradict this by bringing counter-arguments 9 during the pleadings stage or even during the trial. He pointed out that the one who alleges must prove. The cardinal principle of law is that civil claims are decided on the balance of probability, unlike criminal cases, where the standard of proof is beyond reasonable doubt. He maintained that the transfer of funds into the appellant's Bank account was proved. The respondent testified on the deposit of the Tshs. 22,000,000/= into the appellant's Bank account on the 25th of August 2023. Also, there is an admission of the respondent's claims as per response to the demand letter from the respondent's counsel. Furthermore, Mr. Rwegasira argued that the bank officer (PW2) testified in court on transferring funds from the respondent's Bank account at CRDB into the appellant's Bank account maintained at CRDB. There was nothing that contradicted/challenged the facts that PW2's testimony on the said transactions of the transfer of the funds (Tshs. 22,000,000/=) that were withdrawn from the respondent's bank account and deposited to the appellant's Bank account since both Bank accounts are accessible to the bank officer (PW2) who told the court that she uses a unique password to log into the bank system to see what happens to the Bank accounts. io Expounding on his arguments on the appellant's admission to the respondent's claims, Mr. Rwegasira pointed out that Exhibit P3 was tendered in court and admitted in evidence by the trial court. He refuted Mr. Kinawari's contention that the appellant's advocates required the letter to be endorsed by the appellant. He contended that such an argument was only afterthoughts since it was not based on any valid legal basis. He was emphatic that the practice of clients endorsing letters sent by advocates under their instructions does not constitute practice in our jurisdiction, nor did the appellant's counsel dare to share any instances where such is the practice. Mr. Rwegasira invited this Court to apply the estoppel principle to stop the appellant from denying that even the contents of the demand letter alone constitute the admission of all facts stated in that letter and in particular regarding the funds transferred or deposited by the respondent to the appellant's Bank account. The suggestion that the respondent should have called the advocate who wrote the letter is not backed up by any law. Exhibit P3 was served to the respondent's counsel in response to the demand letter for the funds advanced to the appellant by the respondent; thus, the respondent was privy to Exhibit P3 and was competent to tender it in court and the appellant's allegations that appellant never engaged Mnyele, 11 Msengezi law firm are unfound, insisted Mr. Rwegasira. Moreover, Mr. Rwegasira pointed out that Mnyele, Msengezi, and Company Advocates represented the appellant in this case. They filed the first

Written Statement of Defence (WSD) and Notice of Preliminary Objection. Upon the appellant being served with the summons accompanied by the Plaint, which implicitly speaks for itself, that the appellant engaged Mnyele, Msengezi and Company, Advocates to represent him; hence, the rest of the denial of that fact is nothing but an afterthought. Mr. Rwegasira insisted that since the appellant accepted the claim from the respondent by way of the demand letter, he should not be allowed to deny the facts contained in the reply to the demand letter from Mnyele, Msengezi, and Company, Advocates. On the issue of the sanctity of the contract, Mr. Rwegasira argued that the agreement between the appellant and the respondent must be construed on any of its shortcomings against the maker. Additionally, he submitted that it suffices to state that, even though the appellant wishes to rely on the contract to prove his allegations on the existence of a partnership, the appellant proved nothing in the court to indicate that he executed any of the terms, of the contract, thus implying that, he never intended to do any business on his side, yet he went on and drafted a contract and never performed any of the terms but he wants the respondent to be bound by it. In short, the appellant never did anything, and there is zero proof of any business that was done by the appellant; the appellant did nothing on the contract other than receiving money from the appellant, contended Mr. Rwegasira. He maintained that the case laws cited by Mr. Kinawari are distinguishable from the facts of this case. He was emphatic about the appellant's admission of the respondent's claims through the letter from Mnyele, Msengezi and Company Advocates. The respondent testified before the trial court how she arrived at the figure of Tshs. 45 Million. The respondent proved her claims presented in the plaint on the balance of probability, her claims as presented in the plaint. He pointed out that PW2 proved how the transaction of Tshs. 22,000,000/= was made from the respondent's Bank Account No. 0152288701200 to the appellant's Account No. 01J2025438400 at CRDB Bank. She tendered in Court Exhibit P-6 (Bank statement) showing proof of that transaction and Mr. Kinawari did not object. Concerning the 2nd ground of appeal, Mr. Rwegasira argued that while it is true that, where there is a written contract, the oral assertions would cease to take precedence. It has to be noted that there is credible testimony from 13 the parties of this case where it was testified by the respondent and admitted by the appellant that there was a verbal agreement before the existence of the written agreement and that the agreement was prepared by the appellant who is not learned in the law. There is an admission from the appellant that the agreement signed did not cover 100% of what was anticipated by the parties and agreed upon by the parties. An example is the funds that were transferred from the respondent to the appellant, but the transferred amount was not reflected in the agreement. Also, even though there was a transfer of funds from the appellant to the respondent of Tanzania Shillings Ten Million (Tshs. 10,000,000/=), there has never been any written agreement as an update of the transfer or an amendment to that effect. On the other side, the appellant took advantage of the weaknesses and shortcomings of the agreement to suggest that the Tshs. 10,000,000/= refunded was the distribution of the profit, contended Mr. Rwegasira. Additionally, Mr. Rwegasira argued that the appellant failed to appreciate that, despite the shortcomings of the agreement between the parties. The respondent respected and honored her commitment to transfer the funds to

the appellant even before the appellant brought the agreement that he 14 drafted himself and never involved the respondent during its preparations. He argued that, since the appellant is the one who drafted the agreement, it has to be construed against him and not the respondent. He pointed out a legal principle of "contra proferentem" and went on to submit that "Contra proferentem" is a rule of contract interpretation that states that in an ambiguous contract, a term should be construed against the contract's drafter/maker. The term "contraproferentem" is derived from a Latin phrase meaning "against the offeror." Other jurists refer to this legal principle under the canons of construction, contended Mr. Rwegasira. Moreover, Mr. Rwegasira submitted that since the appellant is the party that came up with the agreement for the respondent to sign, and based on the fact that the appellant did not involve the respondent in drafting it, this court should take into consideration that fact and construe the shortcomings of the contract to the extent that, the contract was ambiguous and not self-satisfying the needs of the two individuals to the extent that, the ambiguity invited the oral agreement to at least agree on both before it was signed and even after it was signed since there were transactions before the signing and even after signing that contract. The appellant cannot legally benefit from the shortcomings of the said agreement to avoid it by seeking this court to 15 rely on the cited legal principle as illustrated by the Appellant. It was Mr. Rwegasira's stance that PW1 and PW2 were the witnesses who testified to prove that there was an oral agreement. The credibility of PW2 was never successfully challenged since PW2 was able to identify herself and convince the court that she was an officer from CRDB Bank PLC and that she was responsible for the customer's affairs, including knowing the transactions that happened in the appellant's and the respondent's Bank account. In conclusion, Mr. Rwegasira submitted that based on the principle of equity and the fact that the appellant never proved in court that he performed anything on the contract, he should not be allowed to benefit on any of the grounds of appeal. Mr. Laurean prayed that this appeal be dismissed with costs. Mr. Kinawari did not file a rejoinder submission. Having dispassionately analyzed the rival arguments raised by the learned advocates, let me determine the merit of the grounds of appeal. I shall deal with the first and second grounds of appeal conjointly since both are concerned with the analysis and evaluation of evidence. This is the first Appellate Court to have the power to re-evaluate the evidence adduced and 16 develop its findings. It is on record that the plaintiff produced in court six exhibits including an agreement between the parties hereto for conducting business jointly (Exhibit P1), A demand note from EA Attorneys, addressed to the defendant for a claim of Tshs. 50,000,000/= (Exhibit P2) and reply to the demand letter from Mnyele, Msengezi & Company Advocates (Exhibit P3) signed by Lydia Susuma Advocates (Exhibit P3). The Court's record reveals that the first written statement of defence was drawn and filed by Lydia Susuma, Advocate of Mnyele, Msengezi and Company, Advocates. The respondent testified that there was an oral agreement in which they agreed to do business together, and the respondent gave the appellant a sum of Tshs. 22,000,000/= before the preparation of the written agreement (Exhibit P2). It is also on record that Exhibit P2 was prepared by the appellant herein. In his testimony, the appellant relied on Exhibit P2 to convince the trial court there was no oral agreement between him and the respondent apart

from the terms stipulated in Exhibit P2. As correctly argued by Mr. Laurean, Exhibit P2 does not stipulate important terms in an agreement for conducting joint business; for instance, it does not state the type of business intended to be conducted by the parties, the duration of the contract, distribution of the profit and management of the business. The court's record also reveals that 17 in his testimony the respondent also pointed out the missing essential terms I mentioned above. Under the circumstances, it is evident that the parties agreed on some of the terms orally; that is, there was an oral agreement. For instance, the parties could not have started doing business together without reaching a consensus on the type of business they wanted to do, the formula for distributing profits and managing that business. I think it is opportune to point out here that the position of the law is that a written document supersedes oral assertions; that is, the terms written in the document, be it an agreement or anything, cannot be altered by oral assertions. However, the aforesaid principle does not apply where a document/ agreement is ambiguous or missing some important terms like the one in hand (Exhibit P1). Thus, it is the finding of this court that the parties entered into an oral agreement before signing Exhibit P1. Additionally, the respondent testified that she gave the appellant the sum of Tshs.22,000,000/= before signing Exhibit P1, on the date of signing exhibit P1 gave him Tshs. 3,000,000/= and in September 2019, gave him Tshs.20,000,000/= , and she was given back Tshs. 10,000,000/= only when she was in need of money. The respondent's assertion that the appellant told her that her capital generated a profit of Tshs. 15,000,0000/= is 18 supported by Exhibit P3 (the demand notice for a claim of Tshs.50,000,000/=) and Exhibit P2, reply to the demand letter from Mnyele , Msengezi & Company, Advocates, in which the appellant admitted that he owes the respondent a sum of Tshs. 50,000,000/= .With due respect to Mr. Kinawari, his arguments that Exhibit P2 was wrongly admitted has no merit since, as correctly argued by Mr. Rwegasira , the appellant's 1st Written Statement Defence of the appellant was prepared by Advocate Lydia Susuma of Mnyele, Msengezi & Company Advocates, the same Advocate who signed Exhibit P2. It is not true that the appellant had not engaged Mnyele, Msengezi & Company Advocates before moving to Advocate Kinawari. Thus, the appellant's testimony that he never engaged Mnyele, Msengezi & Company is a lie. The above aside, it is also on record that the appellant prepared Exhibit P1. I agree with Mr. Laurean that any ambiguity in Exhibit P1 has to be interpreted against the appellant, the maker of Exhibit P1. In the final analysis, this court finds that there was a breach of contract since the appellant did not give the respondent the profits obtained from the business as per the money she contributed for the agreed-upon maize 19 business. Not only that, the appellant failed to show the respondent where he was conducting the agreed-upon business. In his testimony, the appellant denied that they agreed to conduct maize business but could not tell the business he agreed to do with the respondent; thus, the respondent's assertions remain more probable than the appellant's assertion since it is incomprehensible that people can agree to conduct unknown business. Coming to the 3rd ground of appeal, to wit; The trial court erred in law and fact by failing to note that when the court rejects to admit an exhibit, it cannot re-admit it later on as it becomes functus officio, the court's record reveals that Exhibit P6 was tendered in evidence by PW2, a bank officer and Mr. Kinawari had no objection to the

admission of the same as Exhibit in this case. Thus, the argument raised by Mr. Kinawari in respect of Exhibit P6 is a pure afterthought. It is noteworthy that if an exhibit is objected to be tendered on the reason of incompetency of the witness trying to tender it in court, a witness competent to tender it, can be summoned to appear in court and tender the same in court as an Exhibit. The court revealed that PW2 was an officer from CRDB bank, and she was a competent witness to tender Exhibit P6. Thus, the 3rd ground to appeal has no merit.

20 Concerning the 4th ground of Appeal to wit, the trial court erred in law and fact in awarding general and specific damages and interests on specific and general damages to the respondent contrary to the law. In the plaint, the respondent prayed for payment of specific and general damages to the tune of Tshs.50,000,000/= and Tshs. 150,000,000/=, respectively. It must be noted that the court usually assesses general damages, and the same need not be proved [See the case of Masolele General Agencies Vrs African Inland Church Tanzania (1994) TLR 192.] I disagree with Mr. Kinawari's contention that the judgment and decree entered by the trial court are erroneous because, one, he did not give any relevant legal authority to support his argument. The case of Anthony Ngoo & Another (supra) relied upon by Mr. Kinawari is irrelevant as the same was an application for the bill of costs, with different facts from the case at hand. Two, the trial court's assessment of general damage is reasonable. Third, the respondent proved Specific damage, as elaborated earlier in this judgment. Fourth, the orders to pay interests on specific and general damages do not contravene any law. Thus, the 4th ground of appeal has no merit. About the 5th ground of appeal, to wit, The trial court erred in law for condemning the Appellant to pay the costs for the case without 21 giving reasons; it is a trite law that the winner deserves to be paid the costs for the case and if he /she is denied costs the court gives the reason behind that. So, Mr. Kinawari's arguments on these grounds of appeal are misconceived. The fact that the respondent won the case entitled her to be granted costs unless there were reasons for denying her the costs of the case. The 5th ground of appeal lacks merit and, thus, is dismissed. From the foregoing, this appeal is hereby dismissed with costs. Dated at Dar es Salaam this 13th day of November 2024 b.k.Phillip JUDGE 22

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