

TANZANIA / JUDGMENT

loveness katungaye vs shukuru mgeni 2023 tzhc 20343 23 august 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB - REGISTRY OF
SONGEA AT SONGEA PC CIVIL APPEAL NO. 18 OF 2023 LOVENESS KATUNGAYE

..... APPELLANT VERSUS SHUKURU MGENI

..... RESPONDENT (Appeal from the decision of the District
Court of Songea at Songea in Civil Appeal No. 29 of 2022)

JUDGMENT

26th July & 23rd August, 2023 KISANYA, J.: The appellant, Loveness Katungaye was the losing party in Civil Case No. 53 of 2022 which the respondent, Shukuru Mgeni, instituted in the Primary Court of Songea Urban at Songea (the trial court). The respondent's claim against the appellant was for payment of TZS 2,500,000 which he (the respondent) handed over to the latter (appellant) for purposes of buying maize. After a trial, the trial court was satisfied that the respondent had proved her case on the required standard. It went on to order the appellant to pay the respondent TZS 2,500,000= being the money he 1 received from him, compensation of TZS 200,000/= and costs of the case. Aggrieved, the appellant unsuccessfully appealed to the District Court of Songea at Songea (the first appellate court). Still undaunted, she has instituted the current appeal which is predicated upon four grounds as follows:

1. That having concurred with the Appellant that the Respondent's evidence had contradiction, the District Court erred in law and in fact in holding that the said contradictions were minor.
2. That the District Court erred in law and in fact in misconstruing the Appellant's second ground of appeal in that whereas the appellant did not object the admissibility of mobile phone messages her complaint was on failure by the trial court to record the contents of the said messages and their import.
3. That the claim before the trial court being that of specific amount, the District court erred in law and in fact in holding that the court had discretion to grant any reliefs. 2
4. That the District court erred in law and in fact in not holding that the purported oral agreement was void for want consideration and vagueness. At the hearing of this matter, both parties appeared in persons, without representation. On taking the floor, the appellant

commenced his submission in support of the appeal by addressing the first ground of appeal. She submitted that the respondent's evidence was contradictory. Her submission was based on the contention that, the respondent testified that she (the appellant) owed him TZS 2,500,000 while the complaint lodged before the trial court was related to TZS 2,000,000/=. The appellant was of the further contention that, one of the respondent's witnesses stated that the money involved in this case was TZS 2,000,000/= As for the second ground on mobile phone the short message (SMS) printouts, the appellant submitted that the said evidence was not related to the case at hand. It was her further contention that the purported SMS printouts were not tendered in evidence during the trial and thus, she was denied to adduce evidence on the same. 3 On the third ground of appeal, the appellant submitted that the trial court awarded compensation in favour of the respondent while the said relief was not prayed for. With respect to the fourth ground of appeal, the appellant was brief that there was no oral contract between her and the respondent herein. In response to the first ground, the respondent submitted that there was no contradiction. He contended that the contract's value was TZS 2,500,000/=: which was paid in two instalments of TZS 2,000,000/= and TZS 500,000/=. It was also his contention that the complaint instituted before the trial court was related to TZS 2,500,000/=. In that respect, he reiterated his position that there was no contradiction as alleged by the appellant. Countering the second ground of appeal, the respondent submitted that the SMS printouts were tendered during trial. He further contended that the appellant did not comment or raise an objection on the admission of the SMS printouts. Therefore, he was firm view that the second ground is not meritorious. 4 As for the third ground of appeal, the respondent conceded that he did not pray for compensation. However, he submitted that the trial court exercised its discretionary power to award the same. Reacting to the fourth ground of appeal, the respondent submitted that the oral contract between him and the appellant was not void. He also contended that the said contract was witnessed by witnesses. Rejoining, the appellant submitted that it is not known as why the purported oral contract was not witnessed by any of her witnesses. Having considered the submission from both sides, I am going to address the first, second and fourth grounds generally. It is my considered view that the said grounds are premised on the question whether the respondent proved his case on the balance of probabilities. Pursuant to record, the respondent relied on an oral contract or arrangement in which the appellant was stated to have received TZS 2,500,000/= from the latter for purpose of doing the business of maize. On the other hand, the appellant disputed to have entered into a contract or received money which gave rise to the suit instituted against her. 5 It is on record that, the trial court and first appellate court arrived at concurrent findings that there was an oral contract between the respondent and the appellant. Further to this, the trial court's decision was based on the SMS printouts which showed that the appellant had acknowledged the respondent's claim and prayed for time within which to settle the same. It is settled position of law that, second appellate courts should not interfere with concurrent findings of the two lower courts below unless where it is obvious that the findings are based on misdirection or misapprehension of evidence or violation of some principle of law or procedure, or have occasioned a miscarriage of justice. I am fortified among others by the

case of Neli Manase Foya vs. Damian Mlinga

- [2005] TLR 167, wherein the Court of Appeal held that: "...It has often been stated that a second appellate court should be reluctant to interfere with a finding of fact by a trial court, more so where a first appellate court has concurred with such a finding of fact. The District Court, which was the first appellate court, concurred with the findings of fact by the Primary Court. So did the High Court itself, which considered and evaluated the evidence before it and was 6 satisfied that there was evidence upon which both the lower courts could make concurrent findings of fact." That position was also restated in the case of Martin Kikombe
- v. Emmanuel Kunyumba, Civil Appeal No. 201 of 2017 (unreported). From the contending submissions, the first, second and fourth grounds of appeal fault the concurrent findings of the two lower courts basing on the ground of misdirection or misapprehension of evidence. It is worthy noting here that in terms of regulation 6 of the Magistrates Court (Rules of Evidence in Primary Courts) Regulations, 1964, a primary court is required to accept such evidence of a party whose weight is greater than the evidence of the other party and the standard of proof is on balance of probabilities. In the present case, the trial court considered the evidence from the respondent to be worthy of belief in respect of the oral contract for maize business. In her first ground of appeal, the appellant faults the first appellate court for misconstruing her second ground of appeal. Pursuant to the petition of appeal which was instituted in the first appellate court, the appellant challenged the trial court for relying on mobile phone short messages (SMS) printout while the contents of the said SMS were not 7 recorded in the judgment. Indeed, the trial court considered the SMS printouts in resolving whether the appellant had received some money from the respondent. Page 7 of the typed judgment bears the testimony. The trial court held as follows: "...upande wa mdaiwa alikanusha kuwa si kweli, hajawahi kupatiwa fedha hizo, ukiangalia kielelezo cha sms, aliweza kukiri kumpatia mdai fedha zake, na pia alimsihi amuongeze muda na hata kumtuma SM2 ili akamuombe mdai, amvumilie atafute fedha, na sms hizi mdaiwa ameshindwa kuelezea alikuwa akizituma kwa kumanisha nini." Now, in its decision, the first appellate court held the view that the appellant did not object admission of the SMS printouts during trial. It thus, dismissed the second ground. In the light of the foregoing, I was inclined to revisit the trial court's record. Having done so, I find nothing to indicate that the respondent tendered the SMS printouts let alone give an oral testimony on the purported SMS printouts. In that respect, the appellant could not object the admission of an exhibit which not sought to be tendered in evidence. The procedure of tendering documentary evidence in the primary court was stated in the case of George Mbushi vs Mniko 8 Magesa, PC Civil Appeal No. 62 of 2019, HCT at Musoma (unreported), when this Court held that: "Further, regulation 8(1)(b) of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations, 1964 provides that facts can be proved by evidence which may be the production of documents by witnesses (documentary evidence). In case where documentary evidence is produced, it can be relied upon if oral evidence to link it with the case is given. This is pursuant to regulation 11(2) of the Magistrates' Courts (Rules

of Evidence in Primary Courts) Regulations, 1964 which provides that: “Where documentary evidence is produced, oral evidence must be given to connect it with the case.” I associate myself with the above position of law. Considering that the SMS printouts were not tendered in evidence, the first appellate court erred in holding that the appellant did not object on the admission of the same during trial. Consequently, I hereby expunge the SMS printouts (Exhibit P1) for being admitted contrary to the law. I also hold that the trial court erred in law and fact in considering the evidence of SMS printout which was not produced before it.

9 Having expunged Exhibit P1, the remaining evidence in respect of the oral contract or arrangement between the appellant and the respondent is the oral testimonies of the respondents and his witnesses. I have noted that, in the first ground of appeal before the first appellate court, the appellant grieved that the trial court erred in law and fact by holding that the respondent had established her claim while there were glaring discrepancies between the testimony of the respondent and that of his witnesses. The appellant contended that, the respondent and his witnesses contradicted on the amount which the respondent gave the appellant. That, while the respondent stated it was TZS, 2,500,000/=, PW2 stated that it was TZS 2,000,000/= whereas PW3 testified that it was TZS 2,500,000/= and that the same was given in two instalments of TZS 2,000,000/= and TZS 500,000/=. On his part, the respondent was of the view that there was no discrepancies. It turned out that the first appellate court agreed with the appellant there was contradiction. However, the said complaint was resolved as hereunder: “the contradiction found in their evidence are (sic) minor and does not go to the root of the case in normal course of business, evidence from different witnesses cannot be unique.” 10 It is trite law, that contradictions in evidence of one witness or among witnesses cannot be avoided in any case. They are evaluated in their proper context in order to determine their gravity. The law is further settled that inconsistency in the evidence of a witness is a basis making decision of lack of credibility only when it is serious and must relates to matter that is relevant to the issue subject to adjudication. See also the case of Maramo Slaa Hofu & Others vs R, Criminal Appeal No. 246 of 2011 (unreported) in which the Court of Appeal held: “It is therefore true that the existence of contradictions, inconsistencies in the evidence of a witness is a basis for a finding of lack of credibility; but the discrepancies must be serious, and must concern matters that are relevant to the issues being adjudicated, to warrant an adverse finding.” Applying the above principle of law to this case, the question is whether the contradiction pointed out by the appellant is minor as held by the first appellate court. The starting point is the particulars of the written complaint which was instituted in the trial court. The respondent pleaded follows: “Mnamo tarehe 12.08.2021 mdai alimpa kiasi cha TZS 2,500,000 kwa ajili ya kununulia mahindi lakini mdaiwa hakufanya hivyo.” 11 As it can be detected from the above excerpt of the complaint, the respondent claimed to have given the respondent TZS 2,500,000/= on 12th August, 2021. However, the handwritten proceedings shows that PW3 Zamayoni Ndunguru stated that the respondent paid the said amount in two instalments of TZS 2,000,000/= and TZS 500,000 respectively. On the other hand, PW2 Stumai Mumba was firm that the appellant received TZS 2,000,000/= while the respondent’s (PW1) evidence suggest that he gave the appellant TZS 2,500,000 without stating whether it was in

instalments. It is my humble view that the said contradiction on the amount of money paid to the appellant is not minor. The stated contradiction goes to the root of the case. It is relevant to the issue related to the amount of money which the respondent gave the appellant which was being adjudged by the trial court. From the evidence of PW1, PW2 and PW3, it is not known whether the appellant received TZS 2,500,000/= as stated by the respondent (PW1) or TZS 2,000,000/= which features in the evidence of PW2's evidence. Further, it is not known as to whether this Court should believe PW3's evidence that TZS 2,500,000/= was paid in two instalments while, the respondent did not state so and the complaint lodged before the trial court shows that the said amount of 12 money was paid on 12th August, 2021. Having decided that the said contradiction goes to the root of the case, I am of the view that the credibility of PW1, PW2 and PW3 is questionable. Thus, their respective evidences were not required to be taken into account. In consequence of the above findings, there remains no evidence to prove the respondent's case against the appellant. Had the trial court and first appellate court analysed properly the evidence adduced by the respondent, the same would not have arrived at concurrent findings that the respondent's case was proved on the balance of probabilities. It suffices to hold here that the first, second and fourth grounds are found meritorious. I find no need of deliberating on the third ground of appeal in which the appellant laments that the trial court granted compensation which was not prayed by the respondent. At the end, I allow the appeal and quash the judgments of the trial court and first appellate court and the orders made thereto. Each party shall bear its own costs. DATED at SONGEA this 23rd day of August, 2023 S.E. KISANYA JUDGE 23/08/2023 13 Court: Judgment delivered this 23rd day of August, 2023 in the presence of the appellant and the respondent. Right of appeal explained. S.E. KISANYA JUDGE 23/08/2023 14

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