

IN THE HIGH COURT FOR ZAMBIA  
 AT THE PRINCIPAL REGISTRY  
 HOLDEN AT LUSAKA  
 (CIVIL JURISDICTION)

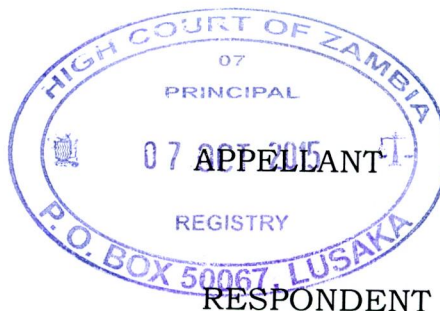
**2015/HP/A007**

**BETWEEN:**

ABDUL KADIR ASAFU JUSAWI

**AND**

SAFIYO MAHAMED HALADID



RESPONDENT

***Before The Honourable Mrs. Justice P.C.M. Ngulube in Chambers***

For the Appellant: In Person

For the Respondent: Ms. Mtonga, National Legal Aid Clinic for Women

---

## JUDGMENT

---

**CASES REFERRED TO:**

1. *Costantine Lane vs. Imperial Smelting Corporation (1942) AC 154*
2. *Popat vs. Sondihata (1997) 3 ALL ER 800*
3. *Nkhata and others vs the Attorney General (1966) ZR 147*
4. *Zambia Railways Limited vs. Pauline S. Mundia, Brian Sialumba (2008) vol. 1 ZR 28 (SC)*
5. *J.K. Rambai Patel vs. Mukwah Kumar Patel (1985) ZR 220 (SC)*
6. *Tembo vs. Hybrid Poultry Farms (Z) Limited SCZ Judgment No. 13 of 2003*

This is an appeal against a Subordinate Court Judgment that was delivered on the 27<sup>th</sup> of November, 2014. The court found that the Plaintiff therein now the Appellant, invested money into

the failed partnership and accordingly ordered that the fair value that the Plaintiff must get from the business is Three Thousand Kwacha as the Plaintiff and the Defendant failed to run the business together. On the 18<sup>th</sup> of May, 2015, the Appellant Abdul Kadir Asafa Jusawi filed four grounds of appeal.

### **Ground One**

The Honourable Court below erred when it made findings of fact that were not supported by the evidence before court and made findings of fact in the absence of any relevant evidence properly before the court to that effect and further that the findings of fact and judgment were clearly made upon a misapprehension of the facts before the court.

### **Ground Two**

That the Court below erred when it held that K3,000=00 was a fair value that the Appellant must get when there was enough evidence from PW2 and PW3 that the Appellant carried out the renovations to the said shop and that he invested a total of Six Thousand Kwacha into the partnership.

### **Ground Three**

The Court below erred when it failed to state the standard of proof that was applied in arriving at the amount that was awarded to the Appellant.

### **Ground Four**

The Court below erred when it did not take into account the money that the Appellant invested into the shops for buying food



stuffs in the sum of Three Thousand Kwacha and goods worth Seven Thousand Kwacha plus One Thousand Kwacha that was used to buy spices, making a total sum of Seventeen Thousand Kwacha that the court should have found due to the Appellant.

The brief history of the matter is that the Appellant and the Respondent entered into a partnership to run a shop. However, after a short while, the parties separated. The said business is however still in operation. The Appellant brought an action claiming the following reliefs:

1. An order that the Defendant renders an account of the joint business entered into between the Plaintiff and the Defendant;
2. An order that the Defendant delivers 50% of such proceeds as separation package to the Plaintiff.
3. An order of injunction restraining the Defendant from prohibiting the Plaintiff to monitor the business.
4. Damages and costs
5. Further or other reliefs.

In the lower court's judgment, the Learned trial Magistrate found that the Plaintiff and the Defendant had failed to run the business together. The court ordered that the Plaintiff gets K3,000 from the business. The said Plaintiff was dissatisfied with the court's ruling hence this appeal.

The Learned Counsel for the Respondent, Ms. Mtonga filed written submissions in which she stated that in every civil matter, the standard of proof used by the court is on a balance of probability. Ms Mtonga submitted that he who alleges must

prove, meaning that the burden of proof lies on the person who substantially asserts the affirmative of the issue. Ms. Mtonga referred to the case of ***Constantine Lane vs. Imperial Smelting Corporation***<sup>1</sup> (1942) AC 154 in which Lord Maugham stated that-

***“the burden of proof in any particular case depends on the circumstances in which the claim arises.”***

Ms. Mtonga submitted that the Appellant did not exhibit any evidence to support the fact that he put money into the business, and further submitted that the Appellant should have produced receipts to show how much he spent on the materials for the renovation of the shop. The Learned Counsel for the Respondent submitted that evidential burden is the burden of adducing sufficient evidence. Ms Mtonga submitted that parties to a partnership are supposed to keep proper books of accounts of the business so as to ascertain each partner's for profits. Since this was not done, the court awarded the Appellant Three Thousand Kwacha on the basis that the Appellant did invest in the business and that the amount is fair in the absence of documents to draw the Appellant's entitlement.

Ms Mtonga submitted that the lower court did not err in law or fact as its findings were based on facts before it. There was no evidence to support the Appellant's allegation. Therefore the court could not uphold the Appellant's claim.

I have considered the submissions of the Appellant and those of the Learned Counsel for the Respondent. Section 1 of the Partnership Act, 1890 defines a Partnership as the relationship



which subsists between persons carrying on a business in common with a view of profit.

Since there was no partnership agreement herein, the Partnership Act of 1890 applies. Section 42 of the Partnership Act provides that-

***“Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the out going partner or his estate, then in the absence of any agreement to the contrary the out going partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of five percent per annum on the amount of his share of the partnership assets.”***

In the present case, the actual figures for the capital contributions made by the partners are not known as they were not conclusively proved in the court below. However, it is clear that both parties invested some capital in the business. Section 24 of the Partnership Act provides that –

***“the interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement express or implied between the partners by the following rules –***

- 1. All the partners are entitled to share equally in the capital and profits of the business and must contribute equally towards the losses whether of capital and profits of the business, and must contribute equally towards the losses whether of capital or otherwise sustained by the firm.”**

The authors of Halsbury's Laws of England state that –

**“Subject to any agreement express or implied between the partners, all the partners are entitled to share equality in the capital and profits of the business, and must contribute equally towards the losses, whether capital or otherwise, sustained by the firm. The rule of equality may be negated by the terms of the contract or by the course of dealing.”**

In the case of **Popat vs Sondihata<sup>2</sup> (1997) 3 ALL ER 800**, whose brief facts are that the Plaintiff and the Defendant were in partnership together in the business of a news agent. The business was carried on at leasehold premises, with the lease assigned to the partners in joint names. The cost of acquiring the assets was funded principally by bank loans while the balance was funded by contributions from the partners to the capital of the partnership. The partnership was at will and it was determined by the Plaintiff after a short while. From that point, the Defendant carried on the business on his own and subsequently purchased the free hold of the premises. Two and half years after the dissolution of the partnership, the premises, together with the goodwill of the business and the fixtures and



fittings were sold at a profit by the Defendant. The Plaintiff successfully brought an action against the Defendant seeking an equal share in the proceeds of the sale as the property was partnership property. The court held that the dictates of Section 24 of the Partnership Act applies equally before and after the dissolution of a partnership.

In addressing the grounds of appeal, grounds one, four and six are partially successful as the Honourable Magistrate did not apply the applicable law. There is need for settlement of accounts between the parties to determine the capital and the shares of the profits that are due to each of them. I therefore order that this be determined by the Deputy Registrar. Regarding the third ground of appeal, which impugns the findings of fact that were made by the lower court. I am guided by the conditions precedent that were laid down by the Supreme Court for an appellant court to reverse the findings of fact of a lower court. This was in the case of **Nkhata and Others vs. The Attorney General**<sup>3</sup> (1966) ZR 147. The conditions are that –

1. The Judge erred in accepting evidence; or
2. The Judge erred in assessing and evaluating the evidence or by taking into account some matter which he or she should have ignored or failing to take into account something he should have considered; or
3. The Judge did not take proper advantage of having seen or heard the witness.
4. External evidence demonstrates that the Judge erred in assessing the manner and demeanour of witnesses.

However, none of these conditions have been met to warrant a reversal of the findings of fact by the lower court. I find no merit in ground five as the standard of proof in such matters is on a balance of probability. The lower court need not have stated it to validate its finding. The case in point is that of **Zambia Railways Limited vs. Pauline S. Mundia, Brian Sialumba<sup>4</sup> (2008) Vol V ZR 28 (S.C).**

In the case of **J.K. Rambai Patel vs. Mukesh Kumar Patel<sup>5</sup> (1985) ZR 220 (SC)**, the Supreme Court held that-

***“Costs are at the discretion of the court but there are certain guidelines which we must follow in exercising that discretion. A successful party will not normally be deprived of his costs unless there is something in the nature of the claim or in the conduct of the party which makes it improper for him to be granted the costs.”***

In the case of **Costa Tembo vs. Hybrid Poultry Farms<sup>6</sup> (Z) Limited SCZ Judgment No. 13 of 2003**, the Supreme Court stated that-

***“a successful litigant is entitled to costs.”***

I therefore from the view that the lower court should have awarded costs to the appellant.

I accordingly award the Appellant costs which shall be taxed in



default of agreement.

Leave to appeal is granted.

**Dated this 7<sup>th</sup> day of October, 2015.**



**P.C.M. NGULUBE  
HIGH COURT JUDGE**