

IN THE HIGH COURT OF TANZANIA  
AT IRINGA

(PC) CIVIL APPEAL NO. 3 OF 2014

(Originating from Civil Appeal No. 9 of 2014 at Iringa District Court  
Original Civil Case No. 21 of 2012 of Urban Primary Court)

VICENT MYOVELA ----- APPELLANT

VERSUS

AYUB LUVINGO & ANOTHER ----- RESPONDENTS

1/12/2015 & 10/12/2015

**JUDGMENT**

KIHWELO, J.

This is an appeal against the decision of the District Court of Iringa in Civil Appeal No. 9 of 2014 which upheld the decision of the Urban Primary Court in Civil Case No. 21 of 2013 which dismissed the appellant's case.

A brief background to this appeal show that way back on 17<sup>th</sup> April, 2013 the appellant caught the respondent stealing his maize from his farm and were loading in a vehicle with registration No. T 116 BRU Make Isuzu the property of one Kyelo from Ipogolo. Upon

heated debate between the appellant and the respondents they ultimately came to terms and agreed to count all the stolen maize and purchase each maize for TShs. 110/- hence amounting to TShs. 918,300/-However, as the respondents did not have cash at hand they pleaded with the appellant that they will pay the money upon return from Dar es Salaam where they were going to sell the maize.

According to the appellant the respondents did not keep the promise hence he had no option but to file the suit before the Primary Court which following full trial the case was decided in favour of the respondents. Dissatisfied by the decision of the Primary Court the appellant filed an appeal before the District Court of Iringa which upheld the decision of the Primary Court hence the instant appeal.

In support of the appeal the appellant filed a Petition of Appeal with two grounds which in essence faults the decision of both the trial court and the appellate court for failure to allow the appellant's key witness to testify.

On the direction of the Court this appeal was heard *exparte* because the respondents did not appear despite the fact that they were dully served.

The appellant being a layperson and unrepresented did not have much to submit but he merely claimed that the respondents should pay back his money TShs. 918,300/-.

I have given a deep and anxious consideration to the records of the two lower courts as well as the grounds of appeal and I have come to the conclusion that there is only one issue which cries for consideration and that is whether or not the instant appeal is meritorious.

In an attempt to answer the above issue I am conscious of the cardinal principle that this is a second appeal therefore this court can only fault the concurrent findings of the two courts below when there is a misapprehension of the evidence, a miscarriage of justice or violation of some principles of law. (See for instance: **DPP V Jaffari Mfaume Kawawa**, [1981] TLR 149 and **Paschal Christopher V DPP**, Criminal Appeal No. 106 of 2006 CAT (unreported)).

A cursory perusal of the evidence on record reveals that the appellant did not produce any witness except for himself and did not tender any documentary exhibits. In his testimony PW1 testified that the alleged theft incidence occurred on 17<sup>th</sup> April, 2012. On the other hand the respondents testified themselves as DW1 and DW2.



In addition to that they produced one other witness Benson Kisava (DW2). In their testimony they all stated that the incidence occurred on 3<sup>th</sup> April, 2012 and that DW3 witnessed the payment of the money which the appellant claims. The appellant despite mentioning that the respondents admitted before the Village Executive Officer (VEO) their indebtedness (kwa mtendaji walikubali kweli wanadaiwa) elected not to produce the Village Executive Officer to testify which makes this court draw an adverse inference. The court has long settled in the case of **Hemed Saidi V Mohemed Mbilu** [1984) TLR 114 where it religiously stated that;

*“Where, for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witness were called they would have given evidence contrary to the party’s interests.”*

I am of the strong conviction that the respondents had strong evidence than the appellant and aware of the cardinal principle of civil trials that he who alleges must prove and the standard of proof is always on the preponderance of probabilities the appellant did not prove his case hence his evidence was outweighed by that of the respondents, and parties in the suit can not tie.

The above being the circumstances I am increasingly of the view that, in this case I have not found a compelling reason to

interfere with the findings of the District Court hence the appeal is devoid of merit as such it is dismissed. However, since the respondents did not appear there is no order for costs.

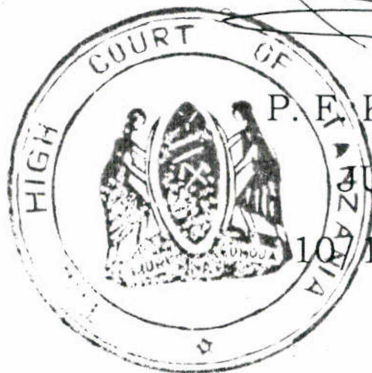


P. F. KIHWELO

JUDGE

10/12/2015

Right of Appeal is fully explained.



P. F. KIHWELO

JUDGE

10/12/2015