

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

PC CIVIL APPEAL NO. 48 OF 2019

(From the District Court of Mvomero in Civil Appeal No. 1 of 2019; Original case: Civil Case No. 33 of 2018 Mikongeni Primary Court)

HAMIS MUSA.....APPELLANT

VERSUS

KILANDI KOLETO.....RESPONDENTS

JUDGMENT

Masabo, J.:

This is a second appeal. The Appellant herein is disgruntled by the decision of the District Court of Mvomero in Civil Appeal No. 1 of 2019 which originated from the decision of Mikongeni Primary Court in Madai Na. 33 of 2018.

The facts leading to this appeal are that, on 29/6/2016 at Mlele Village in Mvomero ditrict, in Morogororo region, a herd of cattle allegedly owned by the Respondent was found grazing on the Appellant's farm thereby causing a destruction of crops worth Tshs 614,000/=. Allegedly, the herder told the appellant that the cattle belonged to the Appellant. The Appellant took the matter to the Village Executive officer whereupon the Respondent was summoned but he informed them he did not solely own the entire herd as some of the cattle belonged to one Kaika. He advised that the herder (cowboy) and the said Kaika be summoned so as identify the cattle which were allegedly found in the farm. This was not done.

The Appellant instituted a criminal case at Mikongeni Primary Court in Jinai Namba 176 of 2016 suing the Respondent for malicious destruction of property. The case was decided in the Respondent favour. The Appellant was advised to institute a civil case. Unhappy with this decision he unsuccessfully appealed to Mvomero District in Criminal Appeal No. 96 of 2016 where he was once again advised to institute a civil case against the Respondent if he wished. After the conclusion of the criminal case, the Respondent unsuccessfully sued the Appellant for malicious prosecution.

Upon conclusion of the malicious prosecution case, the Appellant gained strength. He went back to Mikongeni Primary Court to pursue civil claims against the Respondent. He instituted Madai Namba 33 of 2018 in which he claimed for compensation at a tune of Tshs 614,000/= being the damage occasioned to the crops. The matter was held in his favour. The Respondent was unhappy. He lodged a civil appeal No, 1 of 2019 at Mvomero District Court which allowed and quashed the Mikongeni Primary court on ground that there was no concrete proof that the cows that were found grazing on the farm were indeed the Respondent's as the cowboy was neither sued not called in court to testify. It is this decision which this appeal has been preferred against.

The appellants major complaint is that the appeal court erred in ignoring the fact that the appellant was advised to by Mikongeni Primary Court and Mvomero district court to institute a civil suit against the respondent. He further complains that the court erred in not according weight to the fact that the herder said that the Respondent was the owner of the cattle. His further complaint is that the

court ignored the fact that his crops were damaged, and that the Respondent admitted that he owned the cows.

I have carefully considered the submissions from both parties. This being the second appeal, I am guided by the principle that in the second appeal court does not ordinarily interfere with findings of fact by the courts below, unless there are misdirection's or non-directions on the evidence. Only then can the second appeal court look at the relevant evidence and make its own findings of facts (**The Director of Public Prosecutions V. Jaffari Mfaume Kawawa** [1981] TLR 149; **Buruhani Hawezi v R** Criminal Appeal No. 51 of 2012, Court of Appeal of Tanzania at Mtwara.)

The issue for consideration is therefore whether or not there is any reason for interfering with the findings of fact by the first appeal court that there was no proof that the cows were indeed owned by the Respondent. Upon scrutiny of the records, I have found no reason to fault the finding of the first appeal court in that, first, it is undisputed that the Respondent was not at the scene on the material date. The one at the scene was a herder who was neither sued nor brought to testify. Second, it is on record that from the date of the incidence, the Respondent consistently maintained that he did not solely own the heard and that, some of the cattle were owned by one Kaika and he correctly, in my settled view, advised that the cowboy be summoned to identify the cows that were found grazing on the Appellant's farm but this was not done.

The matter in the instant case is on the nature of vicarious liability in that, the Respondent was not grazing the cattle hence he is not the one who committed the act which caused the damage to the Appellant. The damage was occasioned by the herder who is the servant of the Respondent. Under the law, the employer would be held vicariously liable for the negligent acts performed by his servants in the course of their employment (see **Bamprass Star Service Station Ltd. V. Mrs. Fatuma Mwale** [2000] TLR 391). Thus, it was important to prove not only that the damage was negligently caused but that the cattle which caused the damage were properties of the Respondent and this could only be proved by the herder who, as alluded to earlier was, neither sued nor called to testify.

As correctly held by the first appeal court it is an elementary principle of law that the person who asserts the existence of certain facts had a duty to prove the existence of such facts (see section 110 and 111 of the Law of Evidence Act [Cap. 6 R.E. 2002]). Echoing this principle, the Court of Appeal in **Godfrey Sayi v Anna Siame** (as Legal Representative of the Late Mary Mndolwa) Civil Appeal No. 114 of 2014 The Court of Appeal of Tanzania held that:


"It is a cherished principle of law that, generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provision of section 110 and 111 of the Law of Evidence Act [Cap. 6 R.E. 2002] which among other things states:-

It is therefore the duty of the Appellant to prove that, the damage was negligently caused and that the Respondent was the owner of the cattle that grazed over his crops. By failure to call the herder to testify or to lead any

evidence that the cattle was indeed owned by the Respondent, the appellant failed to discharge his legal duty. Under the circumstances, I see no reason to fault the decision of the first appeal court.

Accordingly, I dismiss the appeal with costs.

DATED at DAR ES SALAAM this 16th day of December 2019.



J.L. MASABO

JUDGE

Ruling delivered today 16th day of December 2019 in the presence of the appellant and the respondent, all appearing in person.



J.L. MASABO

JUDGE