IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

CIVIL APPEAL NO. 9 OF 2020

(Appeal from the judgment and decree of the District Court of Kwimba at Ngudu in Criminal Appeal No. 19 of 2019 dated 25th of February, 2019)

PAUL NG'WELING'WELI @ KABOYA .... APPELLANT

VERSUS

BUSABI BUKI ..... RESPONDENT

JUDGMENT

13th May, & 20th July, 2020

ISMAIL, J.

This appeal arises from the decision passed by the District Court of Kwimba at Ngudu on appeal proceedings filed by the present appellant. It was instituted vide PC Criminal Appeal No. 19 of 2019, challenging the decision of the Primary Court of Kwimba at Buyogo at which criminal proceedings preferred against the respondent were dismissed and the respondent was acquitted of the charges levelled against him.

Charges which founded the trial proceedings related to the allegation of malicious damage to property, contrary to section 326 (1) of

the Penal Code, Cap. 16 R.E. 2019. The respondent was alleged to have grazed his cattle onto the appellant's farm thereby destroying crops and causing a financial loss to the tune of TZS. 925,000/-. The incident allegedly occurred on 19th August, 2019. The trial proceedings involved four prosecution witnesses, against two who were marshalled by the respondent. At the end of the proceedings, the trial court held the view that the appellant had failed to discharge the burden of proving the charges against the respondent. Accordingly, it acquitted the respondent.

The appellant felt hard done by this decision. He took his battle to the District Court, through a three-ground petition of appeal. By a judgment delivered on 25th February, 2020, the court found no fault in the trial court's decision. It upheld the decision and dismissed the appeal. Undaunted, the appellant has knocked the Court's door, this time with a petition of appeal that contains two grounds of appeal, reporduced as follows:

1. *That, the appellate court erred in law and fact by refusing to allow the appeal without taking into consideration that the appellant tendered the agriculture officer report (sic) but the court did not consider it and rejected to record the evidence in the court file without any justifiable reason.*

2. *That, the appellate court erred in law and fact by declaring that the respondent's cow did not destroy the appellant farm (sic) on the ground that the village leaders they (sic) found the cows of the respondent near the farm and not in the farm without taking into consideration it was impossible for the appellant for the appellant to leave the cosw to continue to destroy the crops of the appellant in his farm.*

Disposal of the appeal took the form of written submissions, consistent with the schedule which was drawn by the Court. The appellant began his submissions by laying out the background of the matter right from its inception, the number of witnesses who were paraded for testimony, and the summary of their evidence. Turning on to the first ground of appeal, the appellant contended that this ground had a wide scope such that it contained four other constituent parts which were also reproduced. Looking at what is contended to be constituent parts of the first ground, one gets the impression that some of these parts are stand-alone grounds which introduce a distinct contention that deviates from the main ground. Nevertheless, I will choose to treat the anomaly as trifling and having no bearing on the final outcome of the appeal. The appellant's contention is that, through the prosecution's testimony, the trial court was convinced that sufficient evidence had been adduced to the effect that

damage to the appellant's crops had been perpetrated and that, as a result, loss of TZS. 925,000/- had been suffered. This is why the respondent was found to have a case to answer, technically meaning that a conviction would be entered if no defence had been offered. The appellant further contended that the defence testimony, adduced by DW1 (SU1) and DW2 (2) was too shallow to contradict what he considers to be a water tight evidence led by the appellant. It was wrong, in his view, for the trial court to arrive at a conclusion that led to the respondent's acquittal.

The appellant's other point of contention is that, having attached the Agricultural Officer's report and the Ward Executive Officer's letter to the complaint that founded the trial proceedings, the appellant expressed his desire to have the maker of report summoned in court to testify but the trial magistrate held that need did not arise for such requirement as he felt that the letter was sufficient. The appellant considers that as an error which shouldn't have been condoned by the first appellate court. The appellant further submitted that despite the trial court's undertaking on the report, the same was not considered in the decision, and no reasons were given for such omission. He faults the first appellate court for not holding that the trial court erred when it omitted to record and consider the said report.

With respect to the second ground, the appellant takes a serious exception to the 1st appellate court's holding that no evidence was adduced to prove that the respondent grazed his cows into the appellant's farm. The 1st appellate court's view was based on the fact that the testimony of PW2 (SU2) was to the effect that they found no cows in the appellant's farm. The appellant contended that this holding militates against what the evidence was. He wondered as to how such evidence would be insufficient if the trial court found that the respondent had a case to answer. The appellant argued that it was impossible to let the respondent's cows continue to destroy his crops as he awaited arrival of the leaders. He contended that all witnesses witnessed this except PW4 (SM4). He held that the concurrent finding by the lower courts was erroneous and he urged the Court to allow this ground of appeal and the entirety of his appeal.

In his relatively short rejoinder, the respondent's counsel began by stating the general principle of evidence, as provided for under section 114 of the Evidence Act, Cap. R.E. 2019, which is to the effect that the accuser has a burden of proving the allegation he makes and that the accused shall be discharged if the evidence adduced raises some doubts. He buttressed his argument by referring to the Court of Appeal's decision in ***Martin***

Kikombe v. Emmanuel Kunyumba, CAT-Civil Appeal No.201 of 2017 (Iringa-unreported), in which it was held that one has to prove all ingredients of a charge in order to succeed in a case. In this case, the learned counsel contended that the appellant's reliance to documents which were not formally adduced in evidence, as is the case here, was adjudged erroneous by the Court.

Submitting on the second ground of appeal, the respondent's counsel held the view that since the said documents were not adduced during trial, appending them to the submission at this stage of the proceedings is tantamount to adducing additional evidence on appeal. He argued that, while the Court is allowed to admit additional evidence, such allowance can only be exercised in conformity with section 369 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2019. The respondent was quick to add, however, that circumstances of the appellant's failure to tender the said document rule out application of the Court's power to take such evidence.

The respondent's counsel further held the view that the established principle, as set out in ***Wankuru Mwita v. Republic***, CAT-Criminal Appeal No. 219 of 2012 (unreported), is to the effect that concurrent findings of the lower courts cannot be disturbed unless it is shown that the same were perverse, demonstrably wrong, clearly unreasonable or are a

result of a complete misapprehension of the substance, nature and quality of the evidence. He felt that none of these flaws were found to be relevant in this case. The learned counsel for the respondent held the view that the evidence adduced by the appellant was weak and lacking any corroborative testimony that would be the basis for sustaining a conviction. He took the view that the same was not worth of any reliance by the trial court as the basis for holding the respondent culpable. He urged the Court to dismiss the appeal with costs.

These rival submissions raise one profound question, and this is as to whether the concurrent decisions of the lower courts were erroneous.

Let me start by stating at the outset that this appeal is not meritorious and the concurrent decisions of the lower Courts are free from any blemishes. I shall demonstrate.

With respect to the first ground, the appellant's gravamen of complaint is that the trial court failed to consider the report of the agricultural officer on the loss suffered as a result of the destruction done by the respondent. The respondent is of the view that, since the said document was not tendered in court, then the same would not constitute the basis for the trial court's decision. It is an established principle of law that a party's success in a case is dependent on the weight of evidence

adduced in court. With respect to criminal cases, this burden is cast upon the complainant who serves as the prosecution side in proceedings that commence in the primary court as was the case with the trial proceedings that bred this appeal. This means that the complainant's success, which is essentially a conviction, must arise from the strength of the prosecution's evidence. Such evidence, which is adduced at trial consistent with section 33 of the Primary Courts Criminal Procedure Code (contained in the 3rd Schedule to the Resident Magistrates' Courts Act, Cap. 11 R.E. 2019), must meet the evidential threshold set by the law *i.e.* ***beyond reasonable doubt***. This requirement is derived from an ancient canon of law as highlighted in the legendary commentaries made by Sarkar on Sarkar's Laws of Evidence, 18th Edn., ***M.C. Sarkar, S.C. Sarkar and P.C. Sarkar***, published by Lexis Nexis. At page 1896 of the said commentaries, the learned aptly state as follows:

> ***".... the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof.*** *It is ancient rule founded on consideration of good sense and should not be departed from without strong reason .... Until such burden is discharged the other party is not required to be called upon to prove his case.* ***The Court has to examine as to***

whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party..." [Emphasis added].

This position was underscored in the case of ***Joseph John Makune v. Republic*** [1986] TLR 44, in which it was held:

> *"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case. The duty is cast on the accused to prove his innocence. There are few well known exceptions to this principle, one example being where the accused raises the defence of insanity in which case he must prove it on the balance of probabilities ...."*

The Court of Appeal restated the critical importance of this requirement in the case of ***George Mwanyingili v. Republic***, CAT-Criminal Appeal No. 335 of 2016 (Mbeya-unreported), wherein it was reaffirmed as follows:

> *"We wish to re-state the obvious that the burden of proof in criminal cases always lies squarely on the shoulders of the prosecution, unless any particular statute directs otherwise. Even then however, that burden is on the balance of probability and shift back to prosecution."*

The question that follows here is, was this burden discharged by the appellant? The concurrent findings of the lower courts felt that this burden

was not discharged. I feel so as well. My view is given credence by PW4 whose testimony was not challenged, and it was to the effect that the farm into which the respondent allegedly grazed had no crops as whatever that was planted had been harvested. This testimony was corroborated by the defence testimony which was to the effect that grazing was done outside the appellant's farm. This means that if no grazing was done in the farm, there would never be any destruction which would result in a loss alleged by the appellant.

With respect to the report of the agricultural officer, my hastened conviction is that mere attachment to the statement of complaint cannot be said to be an adduction of the said document as evidence that proves the allegation. Hearing of evidence envisioned in section 33 of the Criminal Procedure Code involves tendering it before the court and have the document tested with a view to determining, not only its admissibility but veracity and weight it carries in proving the allegation. This is the burden that the appellant had and it doesn't seem that the same would be discharged by merely tucking the said report onto the complaint. It is quite in order that the trial court gave it a wide berth in its findings. The same applies to the contention that the trial court persuaded the appellant against calling the agricultural officer for testimony. My unfleeting review of

the trial court proceedings has not given me any glimpse of what the appellant contends. The trial court would not stand in his way if the appellant wanted to marshal attendance of any witness, including the agricultural officer.

With respect to the second ground of appeal, my findings are also based on what I have just stated with respect to ground one of the appeal. In the absence of any testimony which would clearly show that the respondent committed the said offence, the allegation remained unsupported, and the trial court had no option but to hold that the respondent was not culpable. The trial court, as did the first appellate court, took note of the divergence in the testimony of the prosecution and concluded that a case had not been made out to warrant a conviction. I take the contention that the cows were removed from the farm before he reported the incident as a testimony which did not feature in the course of the trial and, therefore, an afterthought which cannot be entertained at this stage.

Overall, I am persuaded by the respondent's argument that circumstances of this case are such that the concurrent findings of the lower courts should be left unscathed.

Consequently, I hold, as I stated earlier on, that this appeal is barren of fruits. Accordingly, I dismiss it in its entirety.

It is so ordered.

DATED **at MWANZA** this 20th day of July, 2020.

M.K. ISMAIL

JUDGE

Date: 20/07/2020

Coram: Hon. M. J. Karayemaha, DR

Appellant: Absent

Respondent: Mr. Jackson Kiboga, Advocate

B/C: B. France

Mr. Jackson:

Your honour, the appeal is for judgment. I am ready to receive it.

Court:

1. Judgment delivered under my hand and Seal of the Court this 20th July, 2020 in the absence of the appellant and Presence of Mr. Jockson Kaboga, learned Advocate for the respondent.
2. Right of Appeal dully explained.

M. J. Karayemaha

DEPUTY REGISTRAR

At Mwanza

20th July, 2020