IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

PC CIVIL APPEAL NO. 22 OF 2020

(Arising from Sengerema District Court in Civil Appeal No. 28 of 2019, originating from Nyakarilo Primary Court in Civil Case No. 46 of 2019)

ZAWADI VALENCE..... APPELLANT

VERSUS

1. MANENO JOSEPH MAHOMBA

2. NANTO HAMRI } **..... RESPONDENTS**

JUDGMENT

Last Order: 04.05.2020

Judgment date: 10.06.2020

A.Z MMGEYEKWA, J

The appellant appealed to this court following his dissatisfaction with the decision of Sengerema District Court in

Civil Appeal No.28 of 2019, which decided in favour of the respondent. Zawadi Valence, the appellant herein, lost an action before the Sengerema District Court against Maneno Joseph and Nanto Hamri (the first and second respondents). The essence of the appellant's action was to challenge the Judgment of the first appellate Court by dismissing her appeal while she believed that the respondents' cattle destroyed her crops.

Given the nature of the controversy, I am compelled to preface the background of the matter in order to appreciate the facts leading to this appeal. The appellant lodged a claim at the Primary Court of Nyakarilo claiming that the respondents' cattle destroyed her crops. The appellant claimed a total sum of Tshs. 5,914,000/= being compensation of her crops which were destroyed by the respondents' cattle. She claimed that the respondents' cattle invaded his plot and destroyed her crops such as beans and maize with a total value of Tshs.5, 914,000/=.

After its findings, the trial court decided in favour of the appellant. Dissatisfied the respondents filed an appeal before the Sengerema District Court. The first appellate Court after hearing evidence from all parties decided in favour of the respondents. Aggrieved by the District Court decision, the appellant has preferred the present appeal.

The appeal is grounded on the following grounds of appeal:-

1. *That both subordinate Court grossly erred in law and fact by disregarding the valuation report done by the Nyakasungwa Ward Agricultural Officer on 23rd August, 2019.*

2. *That both the Trial Court and the first Appellate Court wrongly evaluated the extent of damage and compensation causing injustice.*

3. *That the District Court erred in law for failure to order retrial after it has made a finding that there was a miscarriage of justice on part of the Primary Court by failure to visit locus in quo.*

4. *That the District Court erred in holding that the Court is not supposed to give regard to expert opinion or report tendered by an expert.*

5. *That both lower Courts fatally failed to evaluate the evidence on record against the facts of the case.*

6. *That the District Court erred grossly in dealing with the appeal and cross-appeal without affording time for each Appellant to argue his grounds and each Respondent to respond.*

The hearing was argued by way of written submission whereas, the appellant filed her submission in chief on 26th May, 2020 and the respondent filed a reply on 1st June, 2020 and a rejoinder was filed on 4th June, 2020.

Arguing in support of the appeal, the appellant's Advocate opted to combine and argue together; the first and second grounds of appeal, the fourth and fifth grounds of appeal, and the third and sixth grounds of appeal. On the first and second grounds of appeal, the learned counsel for the appellant submitted that the Agricultural Officer of Nyakasungwa Ward was at the incident site and assessed the damage caused by the herds of cattle owned by the respondents and prepared a professional report thereto. He went on to submit that the 1st appellate court did not consider the Agricultural report and the

testimony of the Agriculture Officer and no any reason was provided to that effect. It was Mr. Mazullah contentious that it will be impossible to compensate the victim without the basis of the said report.

Submitting on the third ground of appeal, the learned counsel for the appellant argued that the District Court erred in law for failure to order retrial after finding that there was a miscarriage of justice on part of the Primary Court by failure to visit *locus in quo*. To support his submission he referred the case of **Nizar M.H v Gulamali Fazal Janmohamed** [1980] TLR 29. Mr. Mazullah argued that the purpose of visiting locus *in quo* is to eliminate minor discrepancies regarding the physical condition of the land in dispute. He added that the first appellate court was required to dismiss the appeal since the duty of the court is also to guide litigants when they have done a mistake so as to reach a fair decision.

In respect of the fourth ground of appeal, the learned counsel for the appellant valiantly argued that the first appellant

court records are silent as to why the court should not give credit to expert opinion or report tendered by an expert. He went on to argue that it is a principle that the evidence of an expert does not bind the court, but there must be reasons for accepting or denying the same. Mr. Mazullah fortified his submission by referring this court to the case of **Hilda Abel v. Republic** [1993] TLR 246.

Mr. Mazullah went on to argue that the first appellate court erred grossly in dealing with the appeal and cross-appeal without affording time for each appellant to argue their grounds of appeal. He added that the judgment of the first appellate court does not show how the appellant defended his case, the same raise doubt and calls for this court to quash and set aside the decision of the first appellant court.

In conclusion, he urged this court to quash and set aside the decision of the first appellate court and allow the appellant to be paid in accordance with the Valuation Report and to order the respondents to pay the cost of this suit.

Responding, the respondents opted to combine and argue the first, second, fourth, and fifth grounds of appeal together and argue separately the third and sixth grounds of appeal.

On the first, second, fourth, and fifth grounds of appeal, the respondents argued that the Agricultural Officer valuation report was considered by both subordinate courts but that alone did not prove the claimant's claims. The respondents argued that the evidence adduced at the trial court was based on the proof of destruction of the appellant's crops but there is no any tangible evidence proving that the respondent's cattle destructed the said crops. The respondents went on to argue that the first appellate court is not bound to base on expert opinion. To buttress their position they cited the case of **Hilda Abel v The Republic (**1993) TLR 246, the Court of Appeal had the following observation:-

> *"Courts are not bound to accept medical experts evidence if there are good reasons for not doing so"*

They went on to argue that based on the above authority the expert report was short of merit.

On the third ground of appeal they submitted that after the District Court findings that the trial court had erred in law for failing to visit the *locus in quo*, the court was not obliged to order the re-trial because the appellate court advanced other reasons which dragged it to allow the appellant's appeal including the fact that "there was no proper identification of thirty heads of cows by specific mark or color. They added that the appellant failed to meet the test of proof, which was laid down by the Court of Appeal of Tanzania in the case of **Abdul Karim Haji v Raymond Nchimbi Aloisi & Another,** Civil Appeal No. 99 of 2001 (unreported).

On the last ground of appeal, the respondents argued that both parties were accorded with opportunities to defend their case, they referred this court to the first appellate court proceedings that the appeals were consolidated. To support their submission they cited the case of **Transport Equipment Ltd v**

Devram P. Valambiha (1992) TLR 182, whereas, the Court of Appeal supported the consolidation of two applications to avoid the delay of the outcome.

In his rejoinder, the learned counsel for the appellant reiterated his submission in chief and continued to argue that both courts failed to evaluate the evidence on record and the extent of damage against the facts of the case. He went on to argue that both lower court grossly erred in dealing with the appeal and cross-appeal without affording time for each appellant to argue their grounds of appeal. He added that both courts did not consider the opinion of the Agricultural Officer Report and there is no reason adduced either by both courts. He insisted that there was tangible evidence to prove that the respondents' cattle were in the appellant's farm since all prosecution witnesses saw cattle and the boy of the respondent on the farm.

In conclusion, he argued this court to allow the appeal and the decision of the trial and appellant court be set aside, the

appellant be paid in accordance with the Valuation report done by the Nyakasungwa Ward Agricultural officer and the respondent be condemned to pay the cost of this suit.

After a careful perusal of the record of the case and the final submissions submitted by the learned counsel for the appellant and the respondents. I should state at the outset that, in the course of determining this case I will be guided by the principle set forth in the case of **Hemedi Said v Mohamedi Mbilu** (1984) TLR 113, which requires, "*the person whose evidence is heavier than that of the other is the one who must win.*"

I am aware that this is a second appellate court, it is settled principle that the second appellate court has to deal with the question of law. But this approach rests on the premise that findings of facts are based on a correct appreciation of the evidence. In the case of **Amratlal D.M t/a Zanzibar Hotel** [1980] TLR 31, it was held that:-

> " *An appellate court should not disturb concurrent findings of fact unless it is clearly shown that there has been a*

misapprehension of the evidence, miscarriage of justice or a violation of some principle of law or practice."

In the present case, I have noted that the District Court of Sengerema consolidated two cases; Civil Appeal No. 28 of 2019, the parties were Nato S/O Amri and Maneno Joseph v Zawadi S/O Joseph and in Civil Appeal No.29 of 2019, parties were Zawadi S/O Joseph v Nato S/O Amri and Maneno Joseph. The records reveal that the first appellate court considered the appeal and cross-appeal.

Regarding the 5th ground of appeal, the appellant' Advocate claimed that both subordinate courts failed to evaluate the evidence on record, I had to scrutinize the court records and found that the appellant (plaintiff) testified that on 23rd August, 2019, she saw a herd of cattle around 35 of 40 cattle in her field destroying her crops and she was able to identify the son of the 2nd respondent (Nanto Hamri) when she asked him whose cattle were he grazing, the young boy replied that the cattle belonged to the 2nd and the 1st respondents. The appellant testified that both respondents arrived at the

appellant's farm and saw the destructions and the Agricultural Officer also was called to witness. The appellant further narrated that the cattle were marked JP and other cattle were not marked.

The appellant's witness one Kuleha Boniphance proved that the respondents' cattle destroyed the appellant's farm and he saw the 1st respondent and the 2nd respondent, and the 2nd respondent wanted to pay a fine of Tshs.200,000/= but the appellant demanded to be paid Tshs. 2,000,000/=. He further testified that the 1st respondent decided to take away his cattle out from the incident of site. Another witness one Marco Hamis also testified the same that both respondents' cattle were ween at the appellant's farm.

The records reveal that the respondents' cattle destroyed the appellant's crops and the same is supported by the Valuation Report, therefore, I have found that the appellant has proved his case on balance of probability as stated in the case of **Hemedi Said v Mohamedi Mbilu** (1984) TLR 113, which requires that "the

person whose evidence is heavier than that of the other is the one who must win."

Addressing the third ground of appeal, that the trial court was required to visit the *locus in quo*. In my view, I find that it was not necessary for the trial court to visit the *locus in quo*. I am saying so because the court is required to undertake a visit to the *locus in quo* where such a visit will clear the doubts as to the accuracy of a piece of evidence when such evidence conflicts with another evidence. The essence of a visit to a locus in quo was elaborated in the case of **Avit Thadeus Massawe v Isidory Assenga** Civil Case No.6 of 2017 Court of Appeal at Arusha (unreported) [14th December, 2018 TANZLII].

Similarly, in the case of ***Nizar M.H. Ladak (supra)*** it was held that:-

> *"...where it is necessary or appropriate to the visit locus in quo the court should attend with parties and their advocates, if any, and with such witnesses who may testify in that particular matter".*

Based on the above authorities, there was no need to visit the site because the piece of evidence was clear, there was no any dispute that the farm was destroyed. In the instant appeal, the appellant's witnesses have testified and the trial court was in position to hear the witnesses testimonies thus it was in better place to evaluate the witnesses evidence. The respondents in their testimonies denied allegations towards them, they claimed that on the particular date they were not around. However, they did not call any witness to support their assertions. I find no weigh in the respondents' assertion that they did not witness the destruction of crops, they were aware that their cattle destroyed the appellant's crops. Therefore, they were required to compensate the appellant.

In relation to the first, second, and fourth grounds of appeal that the subordinate courts disregarded the valuation report, expert opinion and wrongly evaluated the extent of damage and compensation. The record reveals that the first trial court ordered a compensation of Tshs. 1,000,000/= which the appellant thinks is not sufficient compared to the loss suffered. In

the trial court record, the trial court did not state any reason as to why it ordered the respondents to pay the appellant only Tshs. 1,000,000/= out of Tshs. 5,957,000/=. The valuation report is in place and the Agricultural officer calculation included the preparation of the farm Tshs. 850,000/=, the cost of planting and cultivating the said crops Tshs. 564,000/= and the total value all crop which includes harvesting Tshs. 4,500,000/=.

It is undeniable that the appellant incurred costs to maintain her crops. In my view farmers' activities should not be taken lightly, I believe the appellant incurred costs in preparing the farm, planting, cultivating the crops and she was expecting to harvest and sell the crops. It takes time of sweat to bring the farm to the point, the appellant was saving her sweat knowing that she will benefit out of it later. Unfortunately, her plan vanished, and worse enough the respondents denied to compensate her. Therefore, I find that the costs claimed by the appellant is reasonable. However, to be fair I will deduct the costs used to prepare the field which is Tshs. 850,000/=.

In the final analysis, and as I have painstakingly alluded above, it is my finding that the appeal has merit, I proceed to quash and set aside the decision and proceedings of the Sengerema District Court. I order each respondent to pay the appellant a compensation of Tshs. 2,532,000.00/=. The Appeal is allowed without costs.

Order accordingly.

Dated at Mwanza this date 10th June, 2020.

A.Z.MGEYEKWA

JUDGE

10.06.2020

Judgment delivered in the 10th June, 2020 via audio teleconference, and both parties were remotely present.

A.Z.MGEYEKWA

JUDGE

10.06.2020

Right of Appeal fully explained.