

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SONGEA

AT SONGEA

PC CIVIL APPEAL NO. 7 OF 2020

(From Civil case number 01 of 2020 of Mkongo Primary Court and Civil Appeal No. 03 of 2020 at Namtumbo District Court)

GODFREY MKUNGILWA..... APPEALANT

Versus

SAMIKE SILAS BIDARESPONDENT

JUDGMENT

Date of Last Order: 4/05/2021.

Date of Judgment: 18/05/2021.

BEFORE: S.C. MOSHI, J.

This is a second appeal. The first appeal was heard by the District Court of Namtumbo. The case originates from Mkongo primary court in Civil case number 01 of 2020. The Respondent successfully sued the appellant for a sum of T.shs 10,500,000/= being compensation for his fifteen cattle which were taken by the appellant on August 2019 at Namali Village, Mkongo ward at Namtumbo District; the appellant retained them however they got lost while in his hands. Aggrieved by the decision of the trial court the appellant appealed to the district court which upheld the trial court's decision; hence this appeal on the following grounds: -

- 1. That, the first appellate court erred in law and fact to uphold the decision of primary court which was*

not correct as there was no proof of loss of cattle claimed.

2. That, the first appellate court erred in law to uphold the decision of the Primary Court for which there was a clear misdirection and apprehension of the evidence of the primary court.

3. That, the first appellate erred in law and fact to uphold the decision of the Primary court which was decided per incurium.

The appellant was represented by Mr. Dickson Ndunguru, advocate whereas the respondent was represented by Mr. Batista John Mhelela, advocate. The appeal was disposed off by way of written submissions.

Mr. Dickson Ndunguru submitted among other things that the first appellate court erred in law and fact to uphold the decision of the primary court which was not correct as there was no proof of loss of cattle. He argued that the appellant was ordered to pay T.shs.10,500,000/= to the respondent who claimed to have his cattle lost while there was no evidence on the record that the respondent had lost the cattle and that they had attempted to report the matter to any authority or if the appellant had such cows why the said acting Village Executive officer did not take appropriate measures to control them and why it was not under his control.

On the second ground, Mr. Ndunguru stated that the evidence provided was of return of the cattle but the court ordered compensation of the cattle. However, the compensation award was not clear whether it was general damages or specific damages as the loss was not specifically pleaded and proved. In this respect, he cited the case of **Zuberi Augustino vs. Anicet Mugabe** (1992) T.L.R 137.

In respect of the third ground, he said that the trial court awarded compensation without justification as the claim was of fifteen heads of cattle but the court proceeded to award T.shs 10,500,000/= as if the appellant had stolen the cattle. He stated that, it is evident on the record that the cattle left from the appellant and the appellant had no responsibility to ensure that the cattle were under his control all the time and not letting it go to any where without control.

He argued further that, the trial court didn't consider the appellant's evidence and no reasons had been given for non-consideration of the appellant's evidence; the judgement which was delivered by the Primary court in Criminal case No. 28 of 201 where the appellant was acquitted.

In reply, Mr. Mhelela submitted that, the first appellate court was correct by upholding the decision of the Primary court regarding the loss of the respondent's cattle by the appellant as the evidence adduced by respondent, SM2, and SM3 sufficiently proved the loss of cattle which

were under control of the appellant. He said that, the collective evidence of three witnesses at the trial court was credible and reliable thus the court was correct by considering it and acting upon the evidence of key witnesses who witnessed the lost cattle under the appellant custody who was reluctant to release them until payment for the destroyed crops was made.

On the second ground, he admitted that there was misdirection and misapprehension of the evidence by the trial court, as the relief sought was in respect to the return of cattle but the trial court ordered compensation of cattle which was not pleaded. He added that he is alive of the position of the law that courts are not supposed to award a remedy or relief not pleaded by the parties to the suit, however the misdirection and misapprehension of evidence was done by the trial court not the respondent hence his right should not be taken for granted for errors committed by the court. He was of the opinion that this court be pleased to grant an order for trial denovo so that the court should compose a proper judgement conforming to the requirement of law. He cited the case of **Mbeya Cement Company Ltd vs. Elly P. Mwakabanje**, Civil Appeal, No. 109 of 2013, Court of Appeal sitting at Dar es Salaam (Unreported).

On the third ground, he partly agreed to what was submitted by the appellant's counsel that the order of compensation was unjustified as the claim was of loss of cattle. He said the appellant detained the respondent's cattle and was reluctant to release them until his claims of crops destruction were met. Thus, it was impossible for the respondent to take care of his cattle whose control was denied by the appellant until the same got lost in his hands.

On the issue of non-consideration of the evidence of the appellant he said that it was justified by the court as the appellant himself opted not to adduce evidence for reasons that his witnesses could not be found. Thus, the court could not have forced the appellant who deliberately decided not to use his diligence to call his witnesses for proving his case.

He argued that the court be pleased to allow the appeal but order the case file to be remitted to the trial court for trial de novo so that a properly composed judgement is written, he suggested that the right of the parties should not taken for granted for errors committed by the court of law.

The issue to be determined is whether the appeal has merits.

As stated earlier this is the second appellate court, the appellant is appealing against decision of the first appellate court which upheld the decision of the trial court. This court being the second appellate court, it can interfere with the concurrent findings of the two lower courts where

there is misapprehension or non-direction of evidence. See the cases of **Bushagila Ngóga vs. Manyanda Maige** (2002) TLR 335 and **DPP vs. Mfaume Kawawa** [1981] TLR 14

Starting with the first ground, I am of the view that the respondent's evidence was heavier compared to the appellant's evidence. As it was testified that the appellant retained the cattle and refused to release them, he demanded that he should first be compensated for the destruction done by the cattle. The payment was effected but the cattle were not given back to the respondent, as they were not found. The appellant thought that it was the respondent's or his relative who could have taken them secretly. Therefore, since the cattle were last left in appellant's hands then it was appellant's duty to explain the whereabouts of the 15 heads of cattle.

On the issue of damages. The trial court awarded damages but didn't state it categorically whether they were specific damages or general damages. This is understandable because the matter originates from primary court. There is no hard and fast rule requiring to show the distinction of damages to be awarded. Rule 15(1) of the Magistrates Courts (Civil Procedure in Primary Courts) Rules, provides among other things, that the claimant has to show the facts of which the claim is based and when and where it arose, the relief claimed and where the property

is claimed and the value of the property. The application which was filed at the trial court reads thus, I quote: -

"Mimi ninamdai mdaiwa huyu madai ya Tsh 15,000,000/= fedha ambazo mdaiwa alichukua Ng'ombe wangu wapatao kumi na moja wenye thamani ya kiasi cha shilingi 15,000,000/= mnamo mwezi August 2019 huko maeneo ya Likonde mashamabani Kijiji cha Namali, kata Lisimonje, tarafa ya Mkongo. Mdaiwa mpaka sasa hivi hajarejesha ng'ombe wangu. Kiasi ninachomdai..... 15,000,000/=".

From the above quoted paragraph, it is apparent that the respondent sued for T.shs. 15,000,000/= being compensation for the cattle which were retained by the appellant and got lost in the hands of appellant. It doesn't indicate that he was claiming for return of cattle as contended by counsel of both parties. The evidence supports the above assertion that the appellant and three others took fifteen cattle, the value of one cattle is one million; hence fifteen cattle have the value of fifteen million. The evidence was not denied by the appellant as he didn't testify, he instead required the court to rely on the proceeding and judgement of criminal case number 28 of 2019. However, he didn't tender a copy of the proceeding and judgement of the said case, therefore they are not part

of evidence; thus, he cannot blame the court for not considering his evidence as there is no shred of evidence in respect of these documents.

Rule 7 of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations Gn No. 66 of 1972, provides thus: -

7. Courts not to go outside evidence.

"in deciding all cases, the court must confine itself to the facts which are proved in the case and matters it deemed to know or may presume under rules 3 and 4. A court must not take into account any fact relating to the case which it hears of out of court except facts learnt in the presence of the parties during a proper visit to any land or property concerned in the case."

All in all, I find that the trial magistrate gave the reasons for its decision that the evidence adduced by the respondent was heavier compared to that of the appellant. This is in accordance with Rule 6 of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations Gn No. 66 of 1972 which provides thus: -

"In civil cases, the court is not required to be satisfied beyond reasonable doubt that a party is correct before it decides the case in its favor, but it shall be sufficient if the weight of the evidence of the one party is greater than the weight of the evidence of the other."

On the third ground that the trial court awarded compensation of 10,500,000/= without justification. Apparently, the judgment of the trial

court is evident that the magistrate did give reasons for awarding that amount. The respondent claimed that one head of cattle's value is T.sh 1,000,000/=, the court deliberated on the correct assessment of the monetary award in that particular society i.e value of the head of cattle. The court's majority vote was 700,000/=. The amount was multiplied by 15, the result was T.sh. 10,500,000/= which is the total value of all fifteen heads of cattle. I find that the court did correctly deliberate on the award as required under section 7(2) of the Magistrates' Courts Act, Cap. 11 R.E 2019.

That said, this appeal lacks merits, the decision of the trial court is upheld and consequently the appeal is hereby dismissed in its entirety with costs.

Right of Appeal Explained.


S.C. MOSHI

JUDGE

18/05/2021