

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

CIVIL APPEAL NO. 7 OF 2019

(C/F Civil Case No. 6 of 2017 District Court of Simanjiro at Orkesumet)

RAUTO NJAKWA APPELLANT

VERSUS

PAULO BEATUS KASENGENYA RESPONDENT

JUDGMENT

5/3/2021 & 19/3/2021

ROBERT, J:-

The Respondent herein, Paulo Beatus Kasengeny, sued the Appellant, Rauto Njakwa at the District Court of Simanjiro at Orkesumet alleging that the Appellant's herd of cattle caused destruction of crops and irrigation infrastructure in his farm. The trial court entered judgment in favour of the Respondent herein and ordered the Appellant to pay specific damages at the tune of TZS 10,000,000/=, general damages at the tune of TZS 10,000,000/= and 7% interest as per court rate from the date of judgment to the date of full settlement of the decretal sum.

Aggrieved, the Appellant herein preferred an appeal to this court armed with four grounds of appeal which I take the liberty to reproduce as follows:

- 1. That, the trial court erred in law and in fact to hold that the Appellant's cows damaged the Respondent's farm without evidence to that effect from the Respondent's side on balance of probabilities.*
- 2. That, the trial court erred in law to shift burden of proof from the Respondent to the Appellant.*
- 3. That, the trial court erred in law and in fact to award the Respondent specific damages of Tshs. 10,000,000/= after finding that there was no proof of any specific damages suffered by the Respondent.*
- 4. That, the trial court erred in law and fact to award general damages of Tshs. 10,000,000/= to the Respondent without giving the basis for such assessment given by the Respondent.*

At the hearing of this appeal, the Appellant was represented by Mr. John J. Lundu, learned counsel whereas Mr. Gibril Hamad Mangula, learned Counsel represented the Respondent. The appeal was argued by way of written submissions.

Submitting on the first ground, Mr. Lundu faulted the trial Court for holding that the Appellant's cows damaged the Respondent's farm without evidence. He argued that, the 60 heads of cattle alleged by PW1 to have entered his farm and destroyed his properties were not witnessed by the Village or ward officer nor the police. He maintained that the alleged cattle

were not properly identified since PW1 was not sure if he identified them or not.

Submitting further on the evidence adduced by other witnesses, he argued that PW3 simply claimed to have seen the cows which entered into the alleged farm on 5/11/2016 at noon as PW1 was in argument with those who allowed the cows to destroy his farm while PW2 testified that the cows entered the farm on 4/11/2016 and he went to do evaluation on 5/11/2015. Further to that, he stated that PW6 who investigated a Criminal case where PW1 had assaulted DW2 did not tender DW2's statement before the court to prove that a grazing area showed by DW2 belong to the Appellant and DW2 and DW3 alleged that they were assaulted at Nabeera and not at PW1's farm. He maintained further that, DW1, DW2 and DW3's testified that the number of cattle alleged to have entered the farm was 26 and their testimony was not challenged by the Respondent. He stated that, there is no doubt that Respondent's farm was destroyed with cattle the question is whose cattle destroyed it.

Responding to the first ground, Mr. Gibril submitted that, the argument raised by the Appellant in support of this ground does not hold water. He argued that, the evidence adduced by PW2 proved that he has been using the farm in question since 1992. He planted crops and installed irrigation

system for commercial purposes. He insisted that there is no any contradiction between the testimony of PW1 and Pw3. PW3 was only a visitor, he visited the farm on the day the incident occurred and he saw the said cattle entering the Respondent's farm.

He further stated that, Pw3 testified that he came to know later that the cattle saw entering the Respondent's farm belongs to the Applicant herein. He argued further that, PW6 testimony established that the Respondent assaulted the Appellant's daughter at the Respondent's farm which is a proof that the Appellant's cattle destroyed the Respondent's farm. He maintained that, the contradiction was with evidence adduced by DW1 and DW2 whereby DW1 stated that the livestock were returned home by one Nawasa Rauto (DW2), but Dw2 stated that, he injured his leg on that day and he didn't return home with the livestock. He maintained that, the question as to where the livestock went was provided by PW1 (Respondent herein) as he was the one who held the cattle and communicated with ward officers reporting the incident. Thus, he submitted that the first ground of appeal lacks merit.

On the 2nd ground, the Appellant's counsel argued that, since the Respondent is the one who sued the Appellant alleging that the Appellant's cattle damaged his farm, he was supposed to bring evidence

to prove that allegation under section 110 of the Evidence Act, Cap. 6 (R.E 2002). He pointed out that although the Respondent stated when he was being cross-examined that: "*I have nothing else to prove that cows of Rauto committed the crime to my farm*" still the trial court emphasized that the burden to proof was on the appellant to prove his case on the balance of probabilities. He maintained that, as the Respondent was the one who filed Civil Case No. 6 of 2017, he was supposed to prove on the balance of balance of probability that he was entitled to the prayer sought. Proof on probabilities was not seen from the defence side. It was wrong for trial Court to shift the burden of proof to the Appellant herein (Defendant by then).

In reply to the second ground, Mr. Gibril submitted that, the burden of ~~proof never shifted to the Appellant herein. He maintained that, the~~ Respondent proved his case on the balance of probabilities as required by section 100 of Evidence Act, Cap 6 (R.E 2002). He insisted that, it was proved with certainty that, the Appellant's cattle destroyed the Respondent's farm and, if the Appellant was contending, he was duty bound to prove that the said cattle were not his.

He argued that, the Appellant misled this court by quoting the statement from the testimony of PW1 to establish that the Respondent

had no proof that it was Rauto's cows that destroyed his farm. He alerted that, if you read the entire paragraph where that quotation is taken from, one will observe that, the Respondent was merely stating at page 6 of the proceedings that he had no other evidence other than the one tendered and testified.

Submitting further on allegations of assault, he argued that, since the Applicant was the one having knowledge regarding the alleged assault as he filed the criminal case and he knew the reasons leading to that assault which were not explained in the trial, the burden of proving that fact was upon him under section 115 of the Evidence Act, Cap. 6 (R.E.2002). Based on that, he argued that the trial court was correct to shift the burden of proof.

Coming to the third ground, Counsel for the Appellant faulted the trial court for awarding the Respondent specific damages of TZS 10,000,000 having found that there was no proof of any specific damages suffered by the Respondent. He submitted that, the trial Court having refused to award specific damages of TZS 66,000,000/= claimed by the Respondent for reasons that exhibit P1 (valuation report) was not elaborative, that is to say, the witness did not explain how he came up with such amount,

still the Court proceeded to award specific damages of TZS 10,000,000/= without any proof.

Responding to this ground, the Respondent's counsel simply argued that PW3 who is a farm and livestock Master, through his valuation report (Exhibit P1) proved specific damages. He maintained that, the report is an actual proof of specific damages claimed by the Respondent at a tune of TZS 66,000,000/= being specific damages for the destruction of plants/crops and infrastructure. He insisted that, arguments raised by the Appellant are mere afterthoughts because when Exhibit P1 (Valuation report) was tendered there was no objection from the Respondent. He therefore prayed for this ground to be quashed for lack of merit.

Submitting on the last ground Mr. Lundu faulted the trial Court for awarding general damages of TZS 10,000,000/= to the Respondent without stating the basis for such assessment. He maintained that, the reasons for the court's assessment and award of general damages stated as mental stress and disturbance suffered by PW1 were not shown in the evidence of PW1.

In reply, Mr. Gibril submitted that, awarding of general damages is within the discretion of the court based on the damage suffered. He argued that, the Respondent suffered financial loss since the damaged

crops and irrigation system were for commercial purposes, this resulted to mental distress. Thus, he prayed for this ground to be quashed for lack of merit.

Having considered the arguments by both parties and the records of this matter I will now deliberate on issues raised in each ground of appeal in the sequence adopted by parties in their arguments.

On the first ground, I find the evidence adduced by the Plaintiff at the trial Court to be sufficient in establishing that the Appellant's cows damaged the Respondent's farm. PW1 who is well known to the Appellant testified that he found the Appellant's cows in his farm and they had caused destruction in the farm. He asked the individuals who were grazing the said cows to remove them from the farm but they refused. Reacting to that, he took a stick and assaulted DW2. The evidence on record reveals that it was DW2 and DW3 who were grazing their cattle at the Respondent's farm. DW2 admitted to being assaulted by PW1 although he didn't reveal the reason for such assault. Further to this, the testimony of PW6 who investigated the alleged assault revealed that, DW2 was assaulted at PW1's farm, where the alleged damage took place which serves to establish that he was grazing cattle at the Respondent's farm. PW1 testified that he knew the cow belonged to the Appellant

because they used to bring the said cows to his place for water, the individuals who were grazing the said cows were family members of the Appellant and the Appellant had once approached him and asked him to serve the said cows with grasses for pasture after plantation. Thus, the court is satisfied that there is sufficient evidence to establish that it was the Appellant's cows that entered and destroyed the Respondent's farm.

Coming to the 2nd issue, upon revisiting the trial court proceedings and judgment, this Court is satisfied that, the trial court did not shift the burden of proof to the Appellant herein. The Respondent proved his case on the balance of probabilities based on the evidence adduced. It appears that the trial Court expected more information from the Appellant after stated that his cattle did not cause the alleged damage to the crops and ~~irrigation infrastructure of the Respondent. This, it seems, was interpreted~~ by the Appellant as shifting the burden of proof to him. I find no merit to this ground of appeal.

On the third issue, it goes without saying that once a party fails to prove special damages as the law requires, he will not be awarded such damages. To explain this in a clear language, I wish to borrow the words used in the case of **Zuberi Augustino vs Anicet Mugabe** [1992] TLR 137 where the Court stated that:

"It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved."

It was also held in the case of **Masolete General Supplies vs African Inland Church of Tanzania** (1994) TLR 192 that:

"Once a claim for a specific item is made, that claim must be strictly proved, else there would be no difference between a specific claim and a general one..."

In the present case, the trial court Magistrate held that:

"...no prove (sic) that he suffered the damage of such amount. The Exhibit P1 which was depended by Pw1 is not elaborative Pw2 didn't explain to court how he came up with such amount, but because there is no doubt that the farm in dispute was destroyed /damaged and Pw4 admitted to receive the valuation report of the stated farm from Pw2 therefore that is why this court is granted the specific damages to that amount."

This court finds and holds that, the trial court having ruled out that the Respondent herein failed to prove specific damages for failure to elaborate how he came up with the claimed amount, it was mistaken to proceed to award specific damages to the Respondent without proof. That said, I find merit in this ground of appeal.

Coming to the last issue, it is trite law that, general damages has to be assessed as being the direct, natural or probable consequences of the

wrongful act complained of and such consequences may be physical inconvenience and mental distress or suffering.

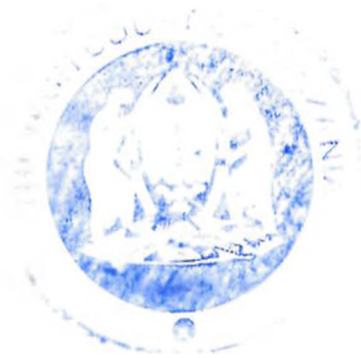
In the present case, the trial court awarded the Respondent TZS 10,000,000/= on the reasons that, the Respondent suffered mental distress and disturbance due to the damage caused in the farm by destruction of crops and irrigation infrastructure. This court thinks the Respondent (Plaintiff) preferred no factual basis to substantiate his prayer for general damages. She did not offer any material information on the so called mental distress. The Honorable magistrate awarded the damages based on his own assumption and not on the facts of the case. In the circumstances of this case, this court considers the award of Tsh. 5,000,000/= as sufficient for general damages. The award of Tsh. 10,000,000/= awarded by the trial court is hereby substituted with that of Tshs. 10,000,000/= for general damages.


In a nutshell, the appeal partly succeeds only to the extent that:

1. General damages is reduced from Tshs. 10,000,000/= and the appellant shall now pay the Respondent Tshs. 5,000,000/= as general damages.
2. Interest on the decretal amount at the rate of 7% per annum from the date of judgment to the payment in full.

3. Each party to carry its own cost.

It is ordered.




K.N. ROBERT
JUDGE
19/3/2021