IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISRTY OF ARUSHA

AT ARUSHA

PC. CIVIL APPEAL NO. 59 OF 2020

(C/F Civil Appeal No. 17 of 2019 in the District Court of Babati at Babati, Originating from Civil Case No. 2 of 2018 at Galapo Primary Court)

DODO TEKWAY.....1ST APPELLANT

SIGE TEKWAY.....2ND APPELLANT

VERSUS

ISMAIL JAMA GULLED (Administrator of the Estate of the Deceased Yusuph Gure).....RESPONDENT

JUDGMENT

14/09/2021 & 10/12/2021

GWAE, J

In the Galapo Primary Court ("trial court"), one Yusuph Gure sued the appellants jointly and severally for the claim of Tshs. 21,400,000/= following the alleged destruction of his farm by the appellants' heads of cattle (a total of 326). The Trial court finally gave its verdict in favour of the respondent and the appellants were ordered to pay the claimed sum to the said Yusuph Gure now deceased whose representative of his estate is Ismail Jama Gulled named herein.

Dissatisfied by the decision of the trial court, the appellants lodged their joint appeal to the District of Babati at Babati (1st appellate court) with a total of four grounds. The District Court entirely upheld the decision of the trial court. Still dissatisfied by the judgment of the first appellate court, the appellants are now before this court as their 2nd attempt to pursue their grievances. In the appellants' Petition of Appeal, the appellants raised a total of eight grounds of appeal which shall be dealt with accordingly.

On hearing of the appeal, the appellants appeared in person whilst the respondent was represented by both Mr. Fridolin Bwemelo and Ms. Beth Sanare both learned advocates. With leave of the court the appeal was disposed of by way of written submission which shall be considered while determining the appellants' grounds of appeal. However, the appellants abandoned ground 3rd, 4th, 7th and 8th ground and equally, the 5 and 6th ground of appeal were jointly argued.

Having the parties' written submissions in place and having carefully perused the records of the courts below, it is now time for the court to determine the grounds of appeal in the manner they appear in the appellants' Petition of appeal.

In the **1st and 2nd** ground of appeal, the appellants are challenging the decision of both the trial court and the first appellate court for ordering the payment of Tshs. 21,400,000/=to the respondent (1st ground), according to the appellants, without proper analysis of the evidence adduced before the trial court.

It is the submission of the appellants that, the respondent herein failed to strictly prove the claimed amount of money in the tune of Tshs. 21, 400, 000/= taking into account the evidence of the agricultural officer who testified that the amount claimed is as a result of the destruction of property but at the same time during cross examination the same witness stated that at her valuation no property was found to be damaged except loss of soil fertility.

Responding to this ground of appeal the respondent contended that this ground of appeal is a new ground which was not raised at the first appellate court however in the alternative the respondent argued that the amount claimed is as a result of the destruction of his farm covering 50 acres caused by the cattle of the appellants and that the decisions of the courts below were founded from the valuation that was done by the agricultural officer.

From the above summary of the rival submissions by the parties, at the outset this court wishes to differ with the respondent's argument that, the issue of the award is a new issue on reason that the basis of the suit at the trial tribunal was on the claim of Tshs. 21,400,000/= therefore the question as to whether the claim was proved or not cannot be regarded as a new issue as the same is directly related to the claim in the suit.

That being said, this court proceeds to join hands with the appellants that the amount claimed was not proven to the required standard. It is vividly clear that before the trial court the respondent's claim against the appellants was of Tshs. 21,400,000/= being the claimed amount resulting from the alleged destruction of the soil of the respondent's farm (50 acres) by the appellants' cattle (326 cattle). The trial court arrived at its decision relying on the evidence of the respondent, the evidence that the appellants were handed over their heads of cattle detained following the respondent's allegation that, they caused destruction in his farm's soil, testimonies of the respondent's witnesses as well as documentary evidence that is the valuation report that was conducted by the agricultural officer (bibi shamba). Part of the holding of the trial court is hereby quoted;

"Baada ya kupiga yowe watu waliokuwa kwenye doria wakasikia yowe hiyo ikabidi waende ambapo ushahidi huu uliungwa mkono na SU2 mwenyewe, SM3, SM4, SM5 ambao walikuwa kwenye msako huo na walishuhudia hao ng'ombe wakiwa kwenye shamba la mdai. Pia tathimini kutoka kwa bibi shamba pia inathibitisha kuwa uharibifu huo ulifanyika. Mdaiwa No. 1 amedai kuwa yeye hakua na ng'ombe waliofanya uharibifu lakini katika ofisi ya Kijiji cha Halu tarehe 13/01/2018 walifanya makabidhiano ya mifugo ambapo wote mdaiwa No.1 na madaiwa No. 2 wameweka Saini zao kama wenye mifugo. Kutokana na ushahidi huu Mahakama imejiridhisha kuwa madai hayo ni ya kweli. Hivyo mdai ameshinda madai yake ya Tshs. 21,400,000/= (milioni ishirini na moja na laki nne)."

It is a well settled position of the law that specific damages unlike general damages must be specifically pleaded and strictly proven (See the case of **Zuberi Augustino vs. Ancent Mugabe** (1992) TLR 132). I have carefully read the trial court's proceedings together with the judgment, it is with no doubt that the amount claimed was not strictly proved on reason that, the evidence which was adduced during trial established as to whether there was destruction of the respondent's farm or not. Even looking at the judgment, it is self-explanatory that, the trial Magistrate directed himself in

proof on the destruction of the respondent's property. With due respect this court finds that this was a misdirection as what to the assessment of the extent of damages sustained by the respondent. Thus, it was expected for the trial court to have fully been satisfied itself that, the amount claimed was sufficiently proven in order to fairly order the appellants to properly redress the respondent from what he had specifically suffered.

I am further sound of the principle that, a report of an expert is a guidance to the trial court but such report is not binding upon a presiding judge or magistrate since evidence of expert witness even if it has not been controverted by other expert or factual evidence as was rightly stressed in the case of **David Kamugisha Mulibo v. Bukop Ltd - Bukoba** (1994) TLR 217

> "The opinion of the labour officer that the appellant was not a member of the respondent's management team was no more than a mere opinion which the court was not bound to follow".

See also **Griffiths vs. TUI (UK) Ltd (2021) EWC**A Civ. 1442

Destruction of the only soul of the farm by the heads of cattle at once, in my view, would not lead to the loss amounting to Tshs. 21, 400,000/=.

Therefore, the present valuation seems to be of higher side. I am also alive of the principle of the law that, the special damages require strict proof nevertheless in our case there is sufficient evidence that the appellants' heads of cattle entered into the respondent's farm which was prepared for farming as rightly held by the courts below save to the amount awarded by the trial court whose basis is the valuation report. The valuation appears in the valuation report is in my view is of high side since no crops that were damaged or destroyed except soil.

This court is also mindful that, this being the second appellate court should not easily depart from the concurrent findings of the courts below however only on special circumstances where there is misapprehension of evidence like the present case then the second appellate court may interfere with such findings. My finding is guided by decision of the Court of Appeal of Tanzania in the case of **Julius Josephat v. Republic,** Criminal Appeal No. 03 of 2017 (unreported)- [2020] TZCA cited with approval in the case of **Mzee Ally Mwinyimkuu @ Babu Seya vs. The Republic,** Criminal Appeal No. 499 of 2017 (Unreported); Where the Court stated that;

> "Perhaps we should now revert to the question we earlier on posed on what this Court is supposed to do given that

> the appellant's defence was not considered. We think we should consider first the supposed duty of the second appellate court. As may be recalled, it is the practice that in a second appeal, the Court should very sparingly depart from concurrent findings of fact by the trial court and the 1st appellate court. In exceptional circumstances, it may nevertheless interfere as such only when it is clearly shown that there has been a misapprehension of the evidence, a miscarriage of justice or violation of some principles of law or procedure by the courts below. This has been expressed in several cases, including those of **Pascal Christopher & 6 Others v. The DPP, Joseph Safari Massay v. Republic,** Criminal Appeal No. 125 of 2012, and **Felix s/o Kichele & Another v. Republic,** Criminal Appeal No 159 of 2005 (all unreported). In the case of **Felix s/o Kichele & Another v. Republic** the Court said: "this Court may, however, interfere with such finding if it is evident that the two courts below misapprehended the evidence or omitted to consider available evidence or have drawn wrong conclusions from the facts, or if there have been misdirection or non-directions on the evidence...."

Steered by the above authority and the questionable evidence of SM6 and the valuation report, this court is legally justified to interfere with the concurrent findings of both the trial court and the first appellate court on reasons that the two courts below failed to properly evaluate the evidence

as a result they erroneously awarded the respondent his claim of Tshs. 21,400,000/= as per the valuation report. Though the specific damages seem to have been exaggerated yet the respondent cannot be left to remain empty handed as was rightly decided in **Bashir Ally (Minor) suing by his next friend Fatuma Zabron vs. Clemensia Falima and two other** (1998) TLR 215 where it was held;

> "Considering the PWI had to travel all the ways from Kigoma to Dar es Salaam and back and the fact that she had incurred unnecessary expenses for transport, food and accommodation. I would allow sum of Tshs. 150,000/= "

The same position was equally stressed in **Zuberi Augustino vs. Anicet** (1992) TLR 137 in which pleaded costs of repair was not proved but was awarded since engine was blown off.

In our case, the acts of the appellants' heads of cattle entering into the farm which was readily for farming season are blameworthy as they must have caused serious damage to the respondent's farm. I thus find it just and fair to substitute the award of Tshs.21,400,000/= by the subordinate courts with Tshs. 6,000,000/ in favour of the respondent.

The **fifth and sixth** grounds of appeal shall be determined together as rightly argued by the appellants, these grounds are on complaints that, the trial magistrate did not recuse himself from hearing the matter as she seemed to have an interest over the matter. In this ground of appeal, I join hands with the findings of the 1st appellate court together with the submission of the respondent that there are established principles which have to be satisfied to enable a Judge or Magistrate to recuse himself from determining the matter before him or him. In fact, I have gone through the entire records of the trial court and I have not seen any the complaint by the appellants against the trial magistrate's impartiality or any appellants' complaint letter requesting recusal by the trial magistrate. This ground of appeal is baseless and is negatively answered.

Before concluding, I find it worth noting that, although the documents were not procedurally produced and admitted by the trial court as required under Order xiii ule (1) of CPC that a document which is not admitted in evidence cannot be treated as forming part of the record (See the Case of **Ismail Rashid vs. Mariam Msati**, Civil Appeal No. 75 of 2015 delivered on the 29th March 2016 (Unreported). But in our case the primary court Rules do not require such strictness.

Having determined the grounds of appeal as herein above, this appeal is therefore partly allowed and partly dismissed. Each party shall bear his own costs of this appeal and those of the courts below.

It is so ordered.

M. R. GWAE
JUDGE
10/12/2021

Court: Right of appeal fully explained

M. R. GWAE
JUDGE
10/12/2021