

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY
AT MWANZA

HC. CIVIL APPEAL CASE NO. 60 OF 2021

(Arising from Civil Case No. 01 of 2021 in the District Court of Ukerewe at Ukerewe)

MALEKI CHAMKAGA APPELLANT

VERSUS

SAMWEL NYAKAREGERESPONDENT

JUDGMENT

22nd July & 10th August, 2022

Kahyoza, J.

Maleki Chamkaga sued **Samwel Nyakarege** for confiscating his fishing gears, and causing him to suffer damage. He claimed Tzs. 38,400,000/= as specific damages for loss of profits, Tzs. 10,497,000/= as value for confiscated property, Tzs. 7,200,000/= as compensation for intervening the contracts and Tzs. 30,000,000/= as general damage. He also claimed interest. The trial court found that **Maleki Chamkaga** had not proved his claims. It dismissed claims with costs.

Aggrieved, **Maleki Chamkaga** appealed to this court contending that the trial court erred to hold that he did not prove his claim on the balance of probabilities, that trial court failed to evaluate the evidence, that the trial

court erred to hold that Samwel Nyakarege did not confiscate his property and that he had a "*bonafide*" claim.

The appeal raises the issues that;-

- a) Did the appellant prove his claim?
- b) Did the trial court evaluate the evidence?
- c) Did the respondent confiscate the appellant's property?
- d) Was the trial court justified to hold that the respondent had a "*bona fide*" claim of right?

Brief the facts are that; Maleki Chamkaga (Maleki) sued Samwel Nyakarege (Samwel) claiming for specific damages, general damages and compensation for confiscated property. Maleki alleged that Samwel confiscated his fishing gears on 20/02/2020. He listed confiscated fishing gears as one Yamaha HP (Horse Power) 9.9, one canoe, Solar battery, one spotlight, one Kabeba, 16 Solar lights, 8 containers, (Vidumu) 3 rope anchors, One engine tank, one kaveru, 2 "*buti*" one "*Flulaini*" ropes one small and one big anchors, sardines fishing nets and 8 "*sikimai*". All valued at Tzs. 10,497,000/=.

Samwel agreed in his defence that he took possession of Maleki's property as lien as Maleki disappeared with Tzs. 4,976,600/=. Samwel did not dispute that he took Maleki's property. He alleged that Samwel was his

supervisor and that he gave him money to pay salary to his employee. Maleki vanished. Samwel contended that in May Maleki complained to the chief executive officer of Chifule. The Chief executive officer summoned Samwel and a contract was entered, where Maleki promised to refund Samwel's money and Samwel promised to return Maleki's fishing gears. Maleki failed to honour the contract. Samwel opened a civil case No. 1/2021 at Ukara Primary Court.

Maleki deposed that Samwel confiscated his fishing gears and listed them. He added that he had hired a boat from Lucas Zabron on an agreement to pay Tzs. 500,000/= monthly and that he had paid Tzs. 3,600,000/=. He also added that he hired another boat from Philipo Chikwabi and that he was required to pay Tzs. 500,000/= monthly. He contended that he had paid Tzs. 3,600,000/.

Maleki Summoned Msilanga Manyama (PW2) who was the hamlet Chairman of Bukiko who executed agreement between Maleki and Zabron, on one side, and Maleki and Philipo Chikwabi on the other.

Msilanga Manyama (PW2), the hamlet chairman of Basaku Ukara Island deposed that Maleki complained to him that Samwel grabbed his fishing gears.

The Samwel's evidence was that the plaintiff was supervising his fishing business. He took his money Tzs. 4,976,600/= and left Samwel's property unattended. He stated that he promised to pay back his money. Maleki refused to pay Samwel instituted a claim at Ukara Primary Court.

Samwel summoned Emmanuel Elias Sabato (DW2) who deposed that Samwel complained to him that Maleki deserted his business and vanished with Tzs. 4,976,600/=. Samwel complained to Elias Sabato (DW2) on 12/05/2021. He deposed that Maleki promised to refund Samwel.

It is against the above evidence the trial court found that Maleki, who was a plaintiff did not prove his case. During the hearing of the appeal the appellant appeared in person and Mr. Laurian, advocate represented the respondent.

Did the appellant prove his claim?

It is trite law in civil cases, that, he who alleges must prove and he must do so to the balance of preponderance. Maleki claimed that Samwel seized without any reasonable cause his fishing gears. Samwel admitted that he took to his possession Maleki fishing gears as Maleki run away with his Tzs. 4.9 million. It is therefore, proved that Samwel grasped Maleki's fishing gears. Maleki listed items which Samwel seized. Maleki's list of seized goods

in the Complaint varied from a list of goods he stated while testifying. While testifying he stated that Samwel took the following items one fishing, boat, worth 4,506,000/=, three ropes worth Tzs. 112,000/=, one anchor worth Tzs. 120,000/= one fishnet worth Tzs. 2,500,000/=, one engine worth Tzs. 1,400,000/=, one Yamaha tank Tzs. 600,000/= fuel line Tzs. 120,000/=, one solar battery No. 18 Tzs. 400,000/=, 16 solar lamps (Tzs.112,000/=), one kabeba worth Tzs. 20,000/=, eith sikimai (Tzs. 80,000/=), one spotlight valued at Tzs. 45,000/=, two boots (not shoes) worth Tzs. 16,000/= 14 meter Kaveru worth Tzs. 28,000/= and 24 ropes (Tzs. 24,000/=). Samwel did not cross-examine Maleki regarding the list of items. It is taken that he accepted the evidence regarding to the items he seized from Maleki. I find it proved that Samwel seized the above listed items from Maleki worthy Tzs. 5,497,000/=.

Having found that it was proved that Samwel seized fishing gears as itemized above, the issue is whether he had any justification. The trial magistrate found that Samwel had justification to take into his possession Maleki fishing gears as the latter took the former's Tsz. 4,976,6000/=.

Samwel referred the dispute to Emmanuel Elias (DW2), who was the village chairman. Maleki claims were based on trespass to goods or chartes and

Samwel's defence was that he had a right of retain items until Maleki refund him his money. He claimed that he had a right to retain Maleki's property until Maleki paid back his Tzs. 4.9 Million. Samwel stated in his Written Statement of defence that he gave money to Maleki who was supervising his business for paying salaries. Samwel deposed that he gave tzs. 4.9 million without stating why he gave him that amount of money while testifying.

I considered Samwel's evidence to find out if he proved his contentions that Maleki's was supervising his business and that he gave him money. Samwel stated in his written statement of defence that Maleki ran away with his money on 15/01/2020 and complained to the chief executive office in May. Emmanuel Elias Sabato (DW2) deposed that Samwel reported to him on 12/05/2021. There was conflicting evidence as to the date Samwel reported to Emmanuel Elias Sabato (DW2).

It is not disputed that Samwel seized Maleki's property before he reported to the village authority. It is also not clear whether Maleki entered into a contract promising to pay Samwel his money as neither Samwel nor Samwel's witness Emmanuel Elias Sabato (DW2) tendered the agreement. Samwel did not convince me that Maleki was supervising his business. He did not tell the court when, how, and for what reason he gave Maleki 4.9

Million while testifying. Samwel alleged that he sued Maleki before the Primary court claiming Tzs. 4.9 million. To every one's dismay he did not while testifying mention the case number. He did not even tender a copy of the primary court judgment. It is very possible that there was such a case existed and the primary court delivered the judgment in favour of Samwel, but the fact Samwel did not tender the judgement, that fact remained unproved. A court of law cannot make a decision on presumption of existence of facts rather on proof of existing of the fact and to standard required. It must not escape any one's mind that in civil cases he who alleges must be prove.

In the instance case, Maleki proved that Samwel seized his fishing gears. In addition, Samwel admitted in the written statement of defence and in his evidence that he seized Maleki's fishing gears. Thus, the duty shifted from Maleki to Samwel to prove that he had a right to take possession of Maleki's fishing gears. Samwel did not adduce a reasonable ground for seizing Maleki's fishing gears. Samwel did not prove his allegation in the plaint that Maleki was supervising his business. He did not testify why he gave money to Maleki or call one of his employees who demonstrated that Maleki was supervising his business.

Samwel's act of taking Maleki's property was civil theft, that is fort. It caused economic injury to Maleki, by denying him an opportunity to use the fishing gears for economic gain. Consequently, I find that Samwel took hold of Maleki's fishing gears without any justification. Maleki is entitled to the value of the seized property.

Samwel claimed for specific damages. He claimed Tzs. 38,400,000/= as a specific damage. It is trite law that specific damages must be specifically pleaded and proved. Maleki did not specifically plead and on scrutiny of the record, it is clear that he did not prove specifically how he suffered the damage. He did not prove how much he was making as profit daily or monthly like the trial court I do not grant the prayer.

Maleki alleged that he hired two canoes, one from Lucas Zabron and Philipo Chikwabi. He never summoned any one of them to testify. He lied there was no such an agreement. For that reason, Maleki's claim for Tzs. 7,200,000/= as compensation for "*intervening contract*" between him and Lucas Zabron, on one side, and between him and Philipo Chikwabi on the other side, is not allowed for want of proof.

Maleki claimed for general damages at a tune Tzs. 30,000,000/=. I find that Samwel did seize Maleki's fishing gears without any reasonable

cause. Samwel certainly caused Maleki to suffer an economic injury. He (Samwel) must redress Maleki. Maleki alleged that Samwel seized his fishing gears in February, 2020, to my dismay Maleki instituted claims in March, 2021. There is no reason why took such time to claim. He contributed to his injury. Maleki had a duty to mitigate the injury. I find therefore, that he is entitled to general damages at Tzs. 5,000,000/=.

Did the trial court evaluate the evidence?

Having answered the first issued in affirmative, I move to consider the second issue, whether the trial court evaluated the evidence. Maleki complained that the trial court erred in law and fact on evaluation and analysis of evidence. The trial court did evaluate the evidence. I found no merit in this complaint.

Did the respondent confiscate the appellant's property?

I find no reason answer this issue as it was covered while considering the first issue. I move to the last issue.

Was the trial court justified to hold that the respondent had a "*bona fide*" claim right?

I will not dwell on this issue, as answered it while considering the first issue. That is a disadvantage of raising general ground of appeal and specific

ones. I find that the respondent might have a genuine reason to take hold of appellant's fishing gears but he did not prove that ground. He left it to the court to presume its existence. The respondent's advocate submitted strongly that the appellant's delayed to institute the claim because he knew what was going on. He also argued that the respondent instituted a claim against the appellant. The primary court ordered the respondent to return the appellant's fishing gears and appellant to pay the appellant's Tzs. 4.9 million. I wish the respondent's advocate's submission was evidence. The opposite is true. The advocate's submission is not evidence. The submission should be based on the evidence on record or the law governing a dispute to be meaningful. The respondent's advocates was swimming against the current, by submitting strongly on facts or matters not part of the record. The respondent's advocate's submission could not save a sinking ship.

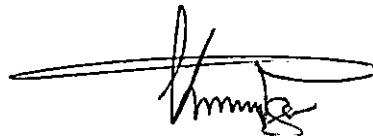
There is no evidence to justify that the respondent had any justification to take hold of the appellant's fishing gear. The trial court, therefore, had no justification to hold that the respondent had a "*bona fide*" claim of right.

In the end, I find that the appellant partly proved his claim. I partly allow the appeal with costs, quash and set aside judgment and decree of the trial court. I grant the appellant the following reliefs-

- a) Payment of the value of the seized property that is Tzs. 5,497,000/=
- b) General damages at the tune of Tzs. 5,000,000/=.
- c) Court rate interest at the rate of 7.5% p.a on the decretal sum from the date of this Judgment until full payment.
- d) Costs of this appeal.

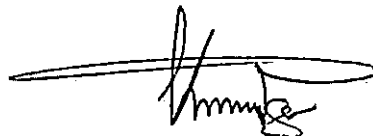
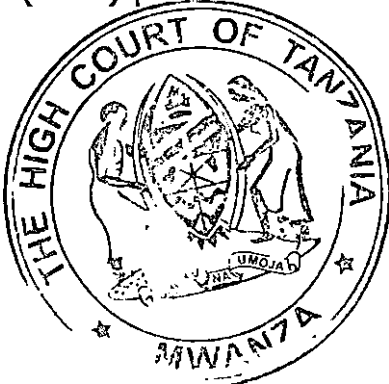
It is ordered accordingly.

Dated at Mwanza this 10th day of August, 2022.



J.R. Kahyoza
Judge
10/08/2022

Court: Judgment delivered in the presence of the appellant and in the absence of the respondent and his advocate, duly notified. B/C Ms Jackline (RMA) present.



J.R. Kahyoza
Judge
10/08/2022