

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY

AT TABORA

CIVIL APPEAL NO. 10 OF 2021

*(Originating from Tabora District Court in Civil Appeal No. 27 of 2019
and Original Civil Case No. 25 of 2019 Kigwa Primary Court)*

ZANZIBAR KANG'WENYA.....APPELLANT

VERSUS

MILEMBE KANG'WENYARESPONDENT

JUDGMENT

Date 10/5/2022-15/7/2022

BAHATI SALEMA, J.:

This is the second appeal. It emanates from the judgment of the District Court. The appellant herein, Zanzibar Kang'wenya in this appeal, filed two grounds of appeal against the decision of the District Court delivered on 20/7/2021 (J.MDOE, RM) in Civil Appeal No. 27 of 2019.

- 1. That the District Court has held that the amount number of cattle (60 valued at TZS 2,400,000/=) claimed and awarded to the respondent by the trial primary court was not justified erred in law in awarding 20 herds of cattle valued at TZS.8,000,000/= to the respondent.*
- 2. That the District Court erred in law for failure to re-evaluate and consider properly the evidence on record and arrived at a wrong conclusion.*

When the matter was scheduled for hearing, with leave of the court the case was disposed of by way of written submission. The appellant was represented by Mr. E. Kamaliza Kayaga, learned counsel, whereas the respondent was represented by Mr. Katabazi, learned counsel.

In his submission, the counsel for the appellant started on the second ground and then reverted to the first ground of appeal. He submitted that the District Court erred in law for failure to re-evaluate and consider properly the evidence on record and arrived at the wrong conclusion.

He submitted that this is a second appeal and it is dealing with a matter that originated from a primary court. He stated further that there are several decisions from this court and the Court of Appeal to fortify the view that, the assessment of credibility as assessed and arrived at by the trial court needs to be affirmed by an appellate court, unless the

same was not arrived at reasonably and that it cannot be rationally supported. See **Ibrahim Ahmed vs. Halima Guleti** [1986] HCD No.76. That this is the position also in the two cases cited by the District Court in **Ali Abdallah Rajabu Vs Saada Abdallah Rajabu** [1994] TLR 132 in **Pia Joseph Vs Republic** [1984] TLR 161. Generally in a second appeal, the appellate court will not easily disturb the concurrent findings of fact by both lower courts, unless it is clearly shown that there is a misapprehension of evidence, leading to a miscarriage of justice. See **Amratlal Damodar Ran vs. Ah Jariwalla** (1980), TLR 31.

He further stated that the first appellate court failed to re-evaluate and consider the evidence on record properly and that this court can now go through the evidence on its own to curb the miscarriage of justice.

He submitted that the respondent's claim was for 60 herds of cattle from the appellant. About 30 years ago, when their father passed away, the respondent had 10 herds of cattle that were left in the hands of the appellant as a pastoral and Kangwa Tinachu their mother. That the 10 herds of cattle had increased to 60.

He further stated that the evidence of SM2, Kulwa Pamagi who is the paternal uncle of the parties, when questioned by the trial Court over the respondent's ten herds of cattle shortly after the death of the parties' father he stated. "*Ng'ombe za Milembe sikuziona.*"

Moreover, he stated that SU3, Kang'wa Tinachu who is the mother of both the appellant and the respondent stated in her evidence, over the respondent's claim for ten herds of cattle stated that;

"...Mimi kama mama yao sijazona na sikuwaamua sababu hawajanisemesha..."Mimi sikumbuki chochote..."

He further submitted that there is no reason at all as to why the evidence of SU2 and SM2, the mother and the paternal uncle, was not considered at all, bearing in mind that they are the closest family members to both the respondent and the appellant. In fact, the evidence of the appellant and SU2, his mother was disbelieved and reduced to mere stories, as clearly seen in the judgment of the District Court, it is unfair to SU2, who is the mother of the appellant and respondent, to be treated as a mere story teller rather than witnesses.

He further stated that it is now a well-settled principle that every witness is entitled to credence and must be believed and his evidence accepted save for good and cogent reason for not believing him. See **Goodluck Kyando vs. Republic** [2006] TLR 363 at p. 367.

Secondly, at page 3-4 of the judgment of the District Court, it was stated that:-

"Further, the evidence suggests that originally there was customary exchange made between the appellant and their relative, the respondent inclusive, immediately after the demise of the father."

He stated that there is no such evidence on the record to show and prove such an arrangement. That finding is based on extraneous matters not established before the court and cannot be supported.

As to the first ground of appeal, the District Court, on page 9 of the typed judgment, stated:-

"Finally, although I hesitate to interfere with the conclusion reached by the trial court yet, I am of the considered view that the amount or number of cattle awarded by the trial court was not justified especially from the time when the respondent had left..."

He submitted that once the District Court came to the conclusion that the award of 60 herds of cattle to the respondent had no justification; the proper recourse was to dismiss the respondent's claim. To award 20 herds of cattle to the respondent as part of the unjustified claim is illegal. He beckoned the court to quash the decision of the lower courts and allow the appeal with costs.

In his reply, the counsel for the respondent submitted that the appellant is appealing from a non-existing case when he stated that he is appealing from Civil Appeal No. 27/2019 from Tabora District Court, which is wrong, but the correct case is Civil Appeal No. 27/2020. Hence, this appeal before the High Court is incurably defective and incompetent.

He further submitted that it is Civil Appeal No. 27 of 2019 instead of the correct one, Civil Appeal No. 27 of 2020, at Tabora District Court. The above-stated irregularities render the proceedings before this court to have been in manifest error, on the face of the record, to conclude a non-existent case to the ends of justice.

He stated that the background of this case is that the respondent left ten herds of cattle in the hands of the appellant as a pastoral and her mother, SU3, Kagwa Tinachu about 30 years ago when she was married.

Therefore, this dispute between the parties centers on the respondent's claim of herds of cattle, which started at Kigwa Primary Court and won the case, whereby the court ordered the appellant to hand over to the respondent 60 herds of cattle.

He further stated that the respondent and appellant, as brother and sister, sat with members of the family to get appropriate solutions,

regarding the cows, but the appellant agreed to offer 60 cows in oral but in action refused to heed demands, the situation which forced the respondent to seek her right to return her herds of cattle from the hands of the appellant.

He submitted that the respondent for almost 30 years had invested in the appellant ten herds of cattle, hence believing it to be increased, while the primary court granted the respondent's relief for an award of 60 herds of cattle, after adducing heavy evidence, which was corroborated by the witnesses of Kulwa s/o Pamagi, Ng'wandu Kuba, Salum Mbagwa and Joseph Luponya.

The District Court was right in re-evaluating and considering the evidence on record and hence arrived at a fair conclusion. He prayed to this court to review the award of 20 herds of cattle and uphold the award of 60 herds of cattle as decided by Kigwa Primary Court as it was right to favour the respondent, which the court considered heavy-weight evidence adduced by the respondent's side at Kigwa Primary Court, although the District Court awarded 20 herds of cattle without giving sufficiently ground to decrease from 60 to 20 herds of cattle. For almost 30 years, since the respondent left 10 herds of cattle in the hand of the appellant as a pastoral and her mother SU3 Kagwa Tinacho for

almost 30 years when she was married, it is automatic that the heads of cattle would be increased.

In his short rejoinder, the counsel for the appellant submitted that the respondent Milembe Kang'wenya originally filed Civil Case No. 25 of 2019 in Kigwa Primary Court claiming 60 herds of cattle. On 7/10/2019 the Primary Court, after hearing the parties, delivered the judgment in favour of the respondent and awarded 60 herds of cattle valued at TZS. 2,400,000/=

The appellant on 25/10/2019 appealed to the District Court of Tabora via Civil Appeal No. 27 of 2019 which was determined on 21/5/2020 before Mdoe, RM who partly allowed the appeal and reduced the award to the respondent to 20 herds of cattle but increased the value to TZS. 8,000,000/=. The appellant was not satisfied with the decision of the District Court and on 4/6/2020 filed Civil Appeal No. 21 of 2020 before the High Court of Tanzania at Tabora

After the parties had presented their written submission as directed, the court on 9/7/2021 quashed the judgment of the District Court of Tabora in Civil Appeal No. 27 of 2019 and directed the District Court of Tabora in Civil Appeal No. 27 of 2019 and directed the District Court to compose a proper judgment.

It is only unfortunate that there was a typing error in the High Court, appearing as PC. Civil Appeal No. 21 of 2019 delivered another composed judgment on 20/7/2021 instead of PC. Civil Appeal No.21 of 2020.

In response to the orders and directions of the High Court, the District Court in Civil Appeal No. 27 of 2019 delivered another composed judgment on 20/7/2021 the subject of the present appeal. Unfortunately again, there was a typing error on the judgment of the District Court whereas the proceeding and decree in appears correctly as Civil Appeal No. 27 of 2019 but the judgment is mistakenly typed as Civil Appeal No. 27 of 2020.

Now it is from the second decision in Civil Appeal No. 27 of 2019 delivered on 21/7/2021 that the appellant filed PC. Civil Appeal No. 10 of 2021 which is now properly before the court for determination.

With such a briefing, there is no Civil Appeal No. 27 of 2020. The typing errors can only be corrected by the Court and without prejudice to the parties, with the view of attaining substantial justice to the parties.

On the merits of the appeal, he insisted that the District Court came to a wrong conclusion. While the Primary Court awarded 60 herds of cattle to the respondent valued at TZS. 2,400,000/= the District Court

purported to reduce the number of cattle to 20 herds of cattle but increase the value to TZS. 8,000,000/=

He insisted that once the District Court had formed an opinion and held that there was no justification for the respondent to be awarded 60 herds of cattle valued at TZS 2,400,000. It was wrong to reduce the award to 20 herds of cattle and at the same time increase the value at TZS. 8,000,000/=. He prayed to this court to quash and set aside both the lower court's decisions.

Having heard the rivalry argument from both parties, the issue is whether the appeal has merit.

As recounted by the appellant in respect of Civil Appeal No. 27 of 2020. The typing errors can only be corrected by the Court and without prejudice to the parties, with the view of attaining substantial justice to the parties. Does this justify striking out the appeal? I think it does not. I find the decision in **Sanyou Services Station Ltd Vs BP Tanzania Ltd (Now PUMA Energy (T) Ltd)**, Civil Application No. 185/17 of 2018, well-grounded. Subject to the nature of the appeal, I say, it is proper for this court to apply the overriding objective rule introduced by the Written Law (Miscellaneous Amendment) Act No.3, 2018. Therefore this has no merit.

This being the second appeal, I am aware of an established salutary principle of law that will guide me in deciding on this second appeal. The first appellate court, therefore, has a duty to re-evaluate the entire evidence on record by reading it together, subjecting it to critical scrutiny, and, if warranted, arriving at its own conclusions of fact. This is an imperative where the trial court failed to discharge this duty.

The duty of this second appellate court is explained well by the Court of Appeal in **Amratlal D. M. t/a Zanzibar Silk Stores v A. H. Jariwara t/a Zanzibar Hotel** [1980] TLR 31, and in **Neli Manase Foya v Damian Mlinga** [2005] TLR 167, cited in **Martin Kikombe v. Emmanuel Kunyumba**, Civil Appeal No. 201 of 2017 (Unreported). In **Neli Manase Foya (Supra)**, the Court had the following to say:

"...It has often been stated that a second appellate court should be reluctant to interfere with a finding of fact by a trial court, more so where a first appellate court has concurred with such a finding of fact."

In such circumstances, having traversed through the lower courts' decisions, both courts had concurred with a finding of fact; what differed was the justification for arriving at such an award. It is my considered view that this court may interfere only if there is a violation

of some principle of law or procedure which has occasioned a miscarriage of justice.

As to the first ground of appeal, it is rightly contended by both parties that the award given by the District Court had no sufficient justification to decrease from 60 to 20 herds of cattle.

Having perused through the court records, the testimony of both parties is purely relied on for credibility and reliability of evidence. In the case of **Ali Abdalah Rajab v Saad Abdallah Rajab and others** [1994] TLR 132, the court held that;

"The decision of this case was wholly based on the credibility of the witnesses. The learned trial magistrate saw and heard the witnesses as they testified. He was therefore in a better position to assess their credibility than this court which merely reads the transcripts of the record.

As rightly stated by the respondent, SM1, Milembe Kang'wenya in the trial court, the evidence adduced by SM2 Kulwa Pamagi, SM3 Ng'wandu s/o Kuba, SM4 Salum Mbagga and SM5 Joseph Luponya corroborated the evidence with the respondent's testimony to know the claim of the cows as they counted them in the cattle shed.

All the witnesses in their testimonies verified that the respondent had 10 herds of cattle and invested in the appellant, and also that she acquired the said cattle when the respondent was a traditional healer, which was proved by SM4 Salum Mbaga who said that they entered into the cattle shed and saw that the respondent had 10 cattle, her mother had 50 cattle, her father left 30 cattle, and the appellant had 2 cattle.

On the contrary, the appellant, Zanzibar Kang'wenya denied knowing nor remembering that the respondent was once a traditional healer, and Tinachu a mother, denied such a dispute. While SU1 who is the appellant, denied having been left with 10 herds of cattle by the respondent when she was married 30 years ago, SU2 Ngasa s/o Jilasa the witness for the appellant, testified that he went to the cattle shed of the appellant to collect cows from the respondent. As to the issue of relatives who testified in court, the stance of the law on relatives was discussed in **Mustafa Ramadhan Kihyo Versus Republic** [2006] T.L.R. 323 which stated that;

"The evidence of the relative is credible and believed unless contrary proved."

Since there was no evidence from proof, I discredit them as the evidence he brought was weaker compared to the evidence of the

respondent. It is trite law that the party whose evidence is stronger than the other must win, as it was held in the case of **Hemed Said Versus Mohamed Mbilu** [1984] TLR 113.

The issue to be considered by this court now is whether the said award by the appellate court was justifiable. Having traversed through the court records, the factual findings of the lower courts that the issue that the respondent had 10 herds' cattle is undisputed.

It is my considered view that the appellate court had discretion judiciously to award the parties upon sufficient reasons, which I wish to reproduce verbatim,

"Finally, although I hesitate to interfere with the conclusion reached by the trial court yet, I am of the considered view that the amount or number of cattle awarded by the trial court was not justified especially from the time when the respondent had left, therefore I do hereby reduce the number of cattle from 60 to 20 equally to TZS 8,000,000."

Having closely gone through the court's judgment and found that the appellate court had not established reasons to substantiate the award granted. It is my view that since there were no proper records of the increase and decrease of cattle for almost 30 years, the appellate court

would have considered the time, work done, and costs incurred by his brother during those times she had left the cows and also considered that cattle are living animals that can increase and decrease in production due to natural disasters such as drought and diseases. All that was never considered when the court arrived at such a decision. Thus, on important points, if they were to be analyzed, the lower courts would not have arrived at the impugned decision.

This situation does not need one to be a genius to figure out the inconvenience. Since it is not disputed that Milembe delivered 10 herds of cattle to her father, and this fact was corroborated by the witnesses. All these being considered by the trial court, I find it prudent to interfere with only the amount of 20 herds of cows awarded without sufficient justification and reduce them to 10 herds of cattle at the current rate.

In the result the award is revised, the proper recourse is to allow the appeal and quash the decision of the lower courts. Since this is a family matter, there is no order as to costs.

Order accordingly.

Bahati

A. BAHATI SALEMA

JUDGE

15/7/2022

Ruling delivered in chamber on this 15th July, 2022 in the presence of both parties via virtual court link.

Bahati

A. BAHATI SALEMA

JUDGE

15/07/2022

Right of Appeal fully explained.

Bahati

A. BAHATI SALEMA

JUDGE

15/07/2022

