

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MUSOMA DISTRICT REGISTRY**

AT MUSOMA

PC CIVIL APPEAL NO. 24 OF 2022

*(Arising from the decision of the District Court of Tarime in Civil Appeal
No. 44 of 2021)*

BETWEEN

MANYAKI BHOKE JOKIHINDA APPELLANT

VERSUS

YAKOBO RYOBA IRONDO RESPONDENT

JUDGMENT

12th September & 11th October, 2022

A. A. MBAGWA, J.:

This appeal stems from the decision of the District Court of Tarime sitting as first appellate court in Civil Appeal No. 44 of 2021. Initially, the appellant, Manyaki Bhoke filed the suit i.e, Civil Case No. 23 of 2021 against the respondent, Yakobo Ryoba Irondo before Nyamongo Primary Court in Tarime District. He claims ten cows as the dowry he paid to the respondent on 2nd January, 2016 to marry the respondent's daughter one Kichabe Yakobo Ryoba.

Before the trial court, the appellant testified that, after he married the respondent's daughter on 2nd January, 2016 in October 2016 his brother-in-law (the respondent's son) came and told him that he was not involved in the whole process of engagement and marriage. He then took the appellant's wife and sent her to his aunt (the respondent's sister) who

was living at Nkome in Geita. After a lapse of two years, the appellant started to search for his wife and he learnt that his wife had married to another man at Katoro, Geita and that the respondent had received the dowry. As such, the appellant petitioned for divorce via Matrimonial Case No. 04 of 2020 before Nyamongo Primary Court and on 05th May, 2021 was granted divorce. Thereafter, he filed the civil suit, the subject of this appeal, claiming the respondent to return his ten cows he paid as dowry. The appellant paraded four witnesses namely, Manyaki Bhoke Jokihinda (appellant), Mwita Marwa Masero (PW2), Mwita Manyaki (PW3) and Yohana Marwa Masero (PW4)

The respondent denied the claims and testified that the appellant decided to fabricate the claims against him due to political quarrels they had. The respondent stated that the appellant married his daughter Kichabe Yakobo Ryoba but no dowry was paid at all. In support of his contention, the respondent called other three witnesses namely, Mwita Ndege (DW2), Mtatiro Kichere (DW3) and Idd Masanchu (DW4).

In the end, the trial Primary Court was satisfied that the appellant established his claims hence it adjudged in the appellant's favour by ordering the respondent to return the ten cows to the appellant.

Aggrieved by the decision of the trial court, the respondent appealed to the District Court of Tarime vide Civil Appeal No. 44 of 2021. He advanced three grounds of appeal which can be summarized as follows;

1. There was no documentary evidence to prove the payment of dowry.
2. There was no proof that the respondent received dowry from another man.
3. That the respondent's (the appellant herein) witnesses were not credible.

In its decision, the District Court found the appeal with merit and consequently quashed decision and orders of the trial court. This time it is the appellant, Manyaki Bhoke Jokinda who was not amused by the decision of the District Court of Tarime hence he brought the appeal at hand. He advanced three grounds of appeal as stated hereunder;

1. That, the learned Magistrate has erred raising new issues which were not grounds of the appeal *suo moto* during the composition of judgment.
2. That, the learned Magistrate has erred in holding that testimony adduced by appellant's witnesses was not credible for the reasons of witnesses being close relatives.

3. That, learned Magistrate having raised new issues ***suo moto*** ought to have observed principle of natural justice.

During the hearing of the appeal, the appellant had the services of Mr. Juma David Mwita, the learned advocate whilst the respondent enjoyed the services of Mr. Innocent John Kisigiro, the learned advocate. The hearing was conducted by the way of written submissions.

In his written submissions, the appellant's counsel conjoined the 1st and 3rd grounds and submitted that the first appellate court Magistrate erred in law and fact by raising new issues ***suo moto*** during the composition of judgment and without according any party an opportunity to deliberate on the said issues. The counsel proceeded that at page three in the third paragraph of the first appellate court judgement, the Magistrate departed from the grounds of appeal and raised a new issue ***suo moto*** namely; whether bride price was paid to the appellant.

The counsel submitted further that it is a trite law that whenever a court ***suo moto*** raises an issue then parties must be accorded an opportunity to address the court with regard to a newly raised issue and if such opportunity is not availed to the parties such denial amounts to breach of the principles of natural justice that no person shall be condemned unheard "*Audi alteram partem*".

Referring to the case of **Kumbwandumi Ndemfoo vs Mtei Bus Services Limited**, Civil Appeal No. 257 of 2018, the appellant's counsel contended that the appellant in this case was entitled for a chance to address the court on the issue which had been raised by the court *suo moto*.

Regarding the second ground of appeal, the appellant's counsel referred this court to Rule 16 (1) of the Magistrates' Courts (Rules of Evidence in Primary Court) (Section 18) GN. 66 of 1972 and submitted that any person may be a witness provided that he or she knows something relevant to the case and he or she is able to understand the questions put to him.

He submitted further that, credibility of witness can only be assessed by the appellate court looking into witness coherence in evidence tendered by him or her and by comparing such evidence and that of other witnesses but not in terms of how related or close the witnesses are. He supported his submission with the case of **Emmanuel Samson vs DPP**, Criminal Appeal No. 264 of 2018 (unreported).

In conclusion the appellant's counsel prayed the appeal to be allowed with costs.

Replying to the appellant's counsel submissions, Mr. Kisigiro contended that the first appellate court did not raise any new issue *suo moto* and

that there was no right to be heard was denied by the court. He further submitted that the first appellate court duly considered the three grounds without introducing new issues. He added that what was done by the first appellate court was to rehear the case and re-evaluate the evidence according to the record and grounds of appeal.

Mr. Kisigiro elaborated that, the said new issue was a contentious issue between the parties in the trial court at page 5 paragraph 3 of the judgment when the court stated that "*tuangalie endapo mahari hiyo ilipokelewa?*" Mr. Kisigiro was of the view that, this is literally translation of "*whether the bride price was received by the defendant now the respondent.*" He further submitted that, the first appellate court raised it as an issue from the first ground of appeal and that it was not a new issue which attracts parties to address it.

As regard to the second ground of appeal, Mr. Kisigiro submitted that if at all the appellant paid dowry to the respondent, there should be celebration of the ceremony according to Kurya tribe and tradition. He added that there were no independent witnesses brought before the trial court by the appellant to prove that he paid dowry to the respondent. The counsel argued further that the street, village or hamlet Chairperson of the particular area was not present on that date when the purported bride price was allegedly paid, thus the evidence of appellant's son and son in

law was not corroborated which was vital to prove his case on balance of probability.

Having submitted so, the respondent's counsel prayed the court to dismiss the appeal with costs.

After canvassing the parties' submissions and record of the appeal, the major issue for determination is whether the appeal is meritorious.

Starting with the 1st and 3rd grounds, I would first agree with the appellant submissions that it is trite law that when the court comes across a new issue far from that submitted by the parties, it should accord the parties with an opportunity to address it on the said issue. See **Mussa Chande Jape vs Moza Mohammed Salim**, Civil Appeal No. 141, CAT at Zanzibar.

In this appeal, however, the new issue which the appellant contended to be raised by the first appellate court was not a new issue as such. As rightly argued by Mr. Kisigiro the said issue on whether the bride price was paid to the appellant was actually the main contentious issue before the trial court. What the first appellate court did was to re-evaluate the evidence of the trial court on a particular issue and come up with its own findings. There was no way the appellate court could dispose of the appeal without raising the points for determination. The first appellate court was

therefore exercising its duty. See the case of **Michael Joseph vs The Republic**, Criminal Appeal No. 506 of 2016, CAT at Tabora.

With regard to the 2nd ground of appeal that the learned Magistrate erred in holding that testimony adduced by appellant's witnesses was not credible for the reasons of witnesses being close relatives, I concur with the appellant's counsel that the first appellate court was wrong.

It is settled principle that that every witness is entitled to credence and his/her testimony must be believed unless there are good cause to the contrary. See **Goodluck Kyando v. Republic** [2006] T.L.R. 363. Further, it is settled position that credibility of a witness can be determined when assessing the coherence of the testimony of that witness and/or when the testimony is considered in relation to the evidence of other witnesses, including that of the other party. See **Vuyo Jack v. The Director of Public Prosecutions**, Criminal Appeal No. 334 of 2016 (unreported).

In the case of **Paulo Tarayi v. Republic**, Criminal Appeal No. 216 of 1994 the Court of Appeal held that:

"We wish to say at the outset that it is, of course, not the law that wherever relatives testify to any event they should not be believed unless there is

also evidence of non - relative corroborating their story".

From the foregoing, what was the first appellate court required to do was to assess the testimony of the appellant's witnesses in relation to the evidence of the other witnesses and find which evidence weighs heavier than the other.

Besides, it is the law that in civil matters the party has to prove its case on the balance of the probability. Thus, the person whose evidence is heavier than that of other is the one who must win, see **Hemed Said vs Mohamed Mbilu**, [1984] TLR 113.

As hinted above, according to the trial court record, the appellant paraded four witnesses. PW2 Mwita Marwa Masero told the court that he is the one who, in the company of Mwita Bhoke (PW3), took the dowry of ten cows to the respondent. The ten cows were three bulls, five heifers and two mature cows. He testified that it was on 2nd January, 2016. He further said that one cow was rejected hence it was substituted for another one on the very same day. PW2's evidence was supported by PW3 Mwita Manyika and PW4 Yohana Marwa Masero, the respondent's neighbour. PW2 was very clear that usually dowry is written but the dowry in question was not written. PW2 also said that on the fateful day i.e., 02/01/2016 he

found neighbours at the respondent's home and that after a brief event the appellant left with his wife.

The respondent, in his testimony, admits that his daughter was at one point in time married to the appellant. This evidence was also supported by his witness Mwita Ndege (DW2). However, the respondent could not explain how her daughter got married to the appellant. The appellant's evidence was very specific that the event took place on 2nd January, 2016. One would expect the respondent to counter this fact by telling the court where he was and what he was doing on that day. However, the respondent concentrated on telling the court that they had political grudges with the appellant.

Having holistically appraised the evidence adduced by both parties, it is my considered opinion that the appellant's evidence is heavier than that of the respondent. It is common cause that in civil case the party whose evidence is heavier than that of the other is the one who must win. see **Hemed Said vs Mohamed Mbilu**, [1984] TLR 113. In the circumstance, it is my findings that the appellant managed to establish his claims on balance of probabilities to wit, that he paid dowry of ten cows to the respondent.

The law enjoins the appellant to claim back the dowry upon breakdown of marriage. Order 37. A. of the THE LOCAL CUSTOMARY LAW (DECLARATION) ORDER (1963), G.N. 279 of 1963 provides;

'Baba wa binti au mrithi wake anaweza kutakiwa kurudisha mahari wakati ndoa inapovunjika'.

Owing to the evidence adduced by the appellant in this appeal, I am satisfied that the appellant established payment of the alleged dowry and breakdown of marriage between him and Kichabe Yakobo Ryoba, the respondent's daughter.

In view of the above deliberations, I find this appeal with merits and thus proceed to allow it. Consequently, the judgment and decree of the District Court of Tarime are quashed and set aside. As such, I uphold the judgment of the trial Primary Court.

Given the chequered history of the matter from the Primary Court, I order each party to bear its own costs.

It is so ordered.

Right of appeal is explained.





A. A. Mbagwa

JUDGE

11/10/2022

Court: Judgment has been delivered in the presence of both appellant and respondent this 11th day of October, 2022




A. A. Mbagwa

JUDGE

11/10/2022