

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

PC CIVIL APPEAL NO. 13 OF 2022

*(Arising from Civil Appeal No. 17 of 2021 from Chato District Court,
originated from civil case No. 41/2021 from Muganza Primary Court)*

TEOJENI LUZIGAMANZI----- APPELLANT

VERSUS

MTAGA TEOJENI----- RESPONDENT

JUDGEMENT

*Last Order: 21.09.2022
Judgement Date: 26.10.2022*

M. MNYUKWA, J.

The appeal before me is an interesting one. The dispute that led to this appeal is a tale between son and father, over the claimed 40 cows that the son has allegedly left to his father who now refuses to give them back to his son. The respondent herein Mtaga Teojen, is the biological son of the Appellant herein one Teojen Luzigamanzi.



The brief background goes that; the respondent instituted a Civil Case No. 41 of 2021 before Muganza Primary Court, claiming against the appellant a sum of 40 cows that had allegedly reproduced from 7 cows that he had been given to him by different people over the years while residing at his father's compound. That he moved out of his father's compound on 22/7/2021 to Runzewe and left his properties and his children under his father's care. As he went back to his father and claimed his 40 cows as his belongings, his father refused to give them. The appellant denied the respondent's claim and uttered that, the respondent used to look after his cows before the respondent refused to continue to do the same after he quarrelled with his mother, as he alleged that his mother refused to take his wife to the hospital, and that's when the dispute raised. At the end of the trial, the trial court findings were to the effect that, the respondent managed to prove that, he had 7 cows which had reproduced over the years, but its sum was not known, and therefore the trial court awarded the respondent a sum of 20 cows or to be paid a sum of Tshs. 12,000,000/=.

Dissatisfied with the trial courts findings, the appellant appalled to the District Court of Chato at Chato with 4 grounds of appeal as follows;

- 1. That the trial court magistrate erred in law and fact to hold that the appellant shall be given 20 cows to respondent or to pay Tsh.*



12,000,000 while the respondent failed to prove the case on the required standard.

- 2. That, the trial magistrate erred in law and fact by failing to evaluate the evidence adduced by the parties.*
- 3. That the trial magistrate erred in law and fact by failure to consider appellant's evidence.*
- 4. That, the trial magistrate erred in law and fact by giving judgement in the favour of respondent basing on assumptions on the number of cows to be compensated.*

The District court upheld the trial court's findings as it held that, the respondent's evidence was heavier than the appellant and the trial court was right to make an assessment of 20 cows to be paid to the respondent reflecting the respondent's evidence on number of cows that has reproduced over the years.

Being further aggrieved, the appellant has now brought this appeal challenging the trial court decision and the 1st appellate court with four grounds of appeal as follows;

- 1. That both the appellate and trial courts erred in law and facts in holding that the appellant should give 20 cows to the Respondent or pay Tshs. 12,000,000/= (Twelve million Tanzania shillings), while the Respondent failed to prove the case on the required standard.*
- 2. That both the Appellate court and trial courts erred in law and facts for failure to evaluate the evidence adduced by the parties.*

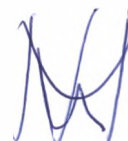


- 3. That both the Appellate court and trial courts erred in law and in facts by failure to consider the appellant evidence.*
- 4. That both the Appellate and trial courts erred in law and facts by giving judgement in favour of the respondent basing on assumption on the number of cows to be compensated.*

The appellant prays for his appeal to be allowed, this court to quash and set aside the decisions of the lower courts and any other relief this honourable court deems fit and just to grant.

When this appeal came for hearing, the appellant had the services of Dickson Ishengoma, learned advocate, and the respondent enjoyed the services of Costantine Ramadhani also learned advocate. The matter was argued orally.

The appellant's counsel started by adopting the grounds of appeal to form part of his submissions. He then opted to argue the four grounds of appeal together. In his submission that, the first appellate court and the trial court both erred in law and fact by deciding in favour of the respondent who was the claimant in the trial court, by basing their decision on the respondent's evidence from PW1 to PW6 in which the 1st appellate court termed them as close relative and since they are relatives to the parties then they cannot lie. He went on that, the assertion is not



proper as the standard of proof in civil cases is on the balance of probability as stated by Rule 1(2) of the Primary Court Rules.

He further averred that, the respondent failed to prove because all witnesses failed to prove the proper identification of the claimed cows in terms of colour and sex. The appellant's counsel cited the case of **Kelvin Project vs R**, Criminal Appeal No. 20 of 2018 and state that, the principle of identification was stated and on page 6, the Court stated that, it is the duty of the respondent to identify his cows conclusively.

He further submitted that, the claim was not specifically proved. That the respondent claimed 40 cows which are allegedly to be in possession of the appellant, but there is no proof on how he derived the same. He went on that, on page 5 of the trial court's judgement, the magistrate stated that the cows were 8. That, it is the position of the law that, specific claim must be specifically proved. He cited the case of **Nurdin Abdallah Mushi v Mutta Robert Rwakatare & Others**, Land case No. 314 of 2016 which provides that, once a claim for specific item is made that claim must be specifically proved and hence, they have to differentiate between specific claim and general claim.

The appellant's counsel further succumbs that, the 1st appellate court in his reasoning stated that the appeal fails because the appellant failed to defend his case which is contrary to principle of evidence. He cited the



case of **Mashaka Rwejela v Faida Stephano**, PC Criminal Appeal No. 7 of 2020, that the duty to prove claims is upon the complainant and the court cannot give judgement against the respondent for failure to defend.

He finalised his submission in chief by praying the decision of the trial court and the first appellate court to be dismissed as there is no evidence which is sufficient to give judgement for the respondent and prayed for this appeal to be allowed.

Responding to Appellant's submission, the respondent's counsel chose to argue the 1st and 4th grounds of appeal jointly and finalise his submission by arguing the 2nd and 3rd grounds of appeal jointly. On 1st and 4th grounds of appeal, he submits that, the respondent managed to prove his case by bringing 6 witnesses and in his evidence, SM1 stated that he owed the appellant 40 cows which were given by the appellant and other blood relatives. That all the witnesses that testified were the blood relatives of the appellant and the respondent, and SM2 is the appellant's child. He went on that, the appellant admitted to give 3 cows to the respondent which gave birth. That the appellant did not deny to owe cows to the respondent. That the appellant stated that, the respondent sold his cows and misused them but he failed to prove the assertion.



The respondent's counsel cited Regulation 2(3) of the Magistrate Court (Rules of Evidence in Primary Court) *G.N No. 66 of 1972*, which requires new fact to be proved, and the appellant failed to prove that the respondent misuse his cows. That, the standard of proof in civil cases is on the balance of probabilities and the court is argued to declare a winner based on the heavy weight of his evidence.

He further reverts to our case at hand and submitted that, the respondent's evidence was heavier compared to the appellant and that's why the court ruled in favour of the respondent. Finalising on the 1st and 4th grounds of appeal, the respondent counsel submits that, the trial court and the 1st appellate court both correctly declared the respondent as the winner.

Submitting on the 2nd and 3rd grounds of appeal, the respondents counsel argues that, the evidence was properly evaluated as shown on page 3 up to page 7 of the 1st appellate court's judgement. That the appellant failed to cross examine on the root of the matter. He further stated the trite position of the law that, failure to cross examine on the important fact is equal to its admission. Respondent's counsel recognize the principle that this court is the second appellate court in which it is not obliged to evaluate but to consider on a matter of law if there is misapprehension of evidence or misdirection of evidence. He relates this



position of the law in the case of **Amratlal Damodar & Another t/a Zanzibar Hotel** [1980] TLR 31. That, the second appellate court should not interfere with the concurrent findings of the lower courts unless there is misapprehension of evidence. He prayed for the appeal to be dismissed.

The respondent's counsel also addressed the issue of identification as argued by the applicant's counsel and submitted that, there was no any dispute in the trial court concerning with the colour or sex of the complained cow. He further distinguished the case of **Kelvin Project v R** (Supra), on the reason that the identification on the case was based on criminal case in which the Republic is required to prove it beyond reasonable doubt while on civil cases the standard of proof is on the balance of probability, and therefore the argument is not merited considering the issue framed in the primary court and the issue of identification of cows is an afterthought.

He went on to distinguish the case of **Mashaka Rwejela** (supra) as the 1st appellate court on page 4 up to 7 gave reason as to why the appeal was dismissed and the cited case is a criminal case in which the standard of proof is different from civil cases. He further submitted that, this is the new ground which was argued without leave of the court. He also distinguishes the case of **Nurdin Abdallah Mush** in which it based on proof of ownership of land in which is different from proof of cows and



the decision was given by the High court in which this court is not bound to follow. He therefore prayed this court to disregard it and the appeal be dismissed.

Re-joining, the appellant's counsel submitted that, the issue of identification is not a new ground as it used to describe the cows. He insisted that, the standard of proof was not met in trial court and the 1st appellate court. That, page 2 of the trial court judgement shows that, the appellant denied the claim. He therefore prayed this appeal to be allowed as prayed in the petition of appeal.

I thank both counsels for their deserving submission in conclusion of this appeal. From the parties' submissions, the issue for determination is whether this appeal is merited.

Before I embark in determining the tabled issue above, I approve the respondent's assertion that, this being the second appellate court, I am not at liberty to disturb the concurrent findings of the lower courts unless I am satisfied that, the findings has brought misapprehension of evidence, violation of principles of laws or procedure, or the findings has occasioned miscarriage of justice.(See the case of **Neli Manase Foya vs Damian Mlinga** [2005] TLR 167, **North Mara Gold Mining Limited vs Emmanuel Mwita Magesa**, Civil Appeal No. 271 of 2019 CAT at



Mwanza and **Juma Kana and Another vs Fita Tabu**, Civil Appeal No. Civil Appeal No. 162 of 2018).

In arguing this appeal, the appellant chose to argue jointly the four grounds of appeal, while the respondent argued the 1st and 4th grounds of appeal jointly, and finalised by arguing the 2nd and 3rd grounds of appeal jointly. I will slightly differ with both parties as I will start to determine the 2nd and 3rd grounds of appeal as it concerns the evidence adduced before the trial court, and I will end up with the 1st and 4th grounds to see if the evidence was to the required standard.

Starting with the 2nd and 3rd grounds of appeal, it is appellant's assertion that, the 1st appellate court and the trial court both failed to evaluate the evidence adduced and also failed to consider the appellant's evidence. The respondent submitted that, the respondent managed to bring 6 witnesses who testified to the effect that, the respondent was given cows by other relatives and the appellant himself.

After I observed the 1st appellate court decision, I do not agree with the appellant's submission that the first appellate court failed to evaluate the evidence and consider the appellant's evidence. The reason for my findings is, the 1st appellate court was able to evaluate the evidence adduced in the trial court's as it is evident from page 4 of the 1st appellate court decision. The judgement itself evidently shows that, the 1st appellate



magistrate started by reproducing what transpired at the trial court and went on to state what the trial court was supposed to take into consideration in determining the issue. The 1st appellate court went further to state the rules of evidence that was applicable in the trial court and he cited Rule 8 and 9 of the *Magistrate Courts (Rules of Evidence in Primary Court) Regulations, G.N No. 66 of 1972*.

On page 6 of the 1st appellate court, the magistrate went on to evaluate the evidence testified by the respondent's witnesses while taking into consideration that, it was the 1st appellate court and so it had the duty to re-evaluate the evidence adduced and reach its own findings if need arises (See the case of **Yohana Dionizi and Shija Simon vs Republic**, Criminal Appeal No 114 of 2015, **Jumanne Salum Pazi vs Republic** (1981) TLR 246 and the case of **Diamond Motors Limited vs K-group (T) Limited**, Civil Appeal No. 50 of 2019).

Without biasing on the appellant's evidence, the 1st appellate court did consider the appellants evidence to the extent of terming it as an evasive denial as it did not dispute the claimant assertion. Therefore, from that observation it is my finding that, both the trial court and the 1st appellate court was able to evaluate the evidence as adduced at the trial court as well as to consider the appellant's evidence. Consequently the 2nd and 3rd grounds are hereby dismissed.



Regarding the 1st and 4th grounds of appeal, it is the appellant's argument that, the 1st appellate court and the trial court both erred in law by deciding in favour of the respondent while he failed to prove his claim on required standard. His main assertion based on two aspect that, one, the respondent failed to prove the identification of the claimed cows, and two, the respondent failed to specifically prove that, the cows claimed reproduced to 40 cows.

It is a settled principle of law that, in civil cases the standard of proof is on the balance of probabilities, as it was held in the case of **Daniel Arael Urio vs Exim (T) Bank**, Civil Appeal No. 185 of 2019, in which the Court of Appeal sitting at Arusha while quoting with approval the case of **Mathias Erasto Manga v Ms. Simon Group (T) Limited**, Civil Appeal No. 43 of 2013, stated that;

"The yardstick of proof in civil case is the evidence available on record and whether it tilts the balance one way or the other, departing from this yardstick by requiring corroboration as the trial court did is going beyond the standard of proof in civil case."

Specifically, standard of proof in primary court is being guided by the provision of Regulation 6 of The Magistrates' Courts (Rule of Evidence in Primary Courts) Regulation *G.N No. 66 of 1972*, which states that;



Regulation 6

In civil case, the court is not required to be satisfied beyond reasonable doubt that a party is correct before it decides the case in its favour, but it shall be sufficient if the weight of the evidence of the one party is greater than the weight of the evidence of the other.

From the above provision and the case law above the respondent was required to prove on balance of probability that, he owed 40 cows by the appellant. I subscribe to the respondent argument that, the cited cases of Mashaka Rwejela (supra) and KelvinProject (supra) are distinguishable as the standard of proof in criminal cases are that of beyond reasonable doubt which is quite distinguishable at our case at hand.

from the appellant's assertion that, the identification of cows was not proper, I am of the settled view that, identification of cows was not an issue as rightly argued by the respondent's counsel, and going as far as to prove what colour were the cows, will be going beyond the standard of proof in civil cases. Besides, the appellant did not deny that, the respondent had cows, he only asserted that the respondent wasted his cows without further explanation as how or any other evidence to prove the same. Therefore, I agree with the respondent's counsel that the issue of identification was just an afterthought.



Moving to the second aspect that, the claim was not specifically proved, it is true that claims that are specifically pleaded, must also be specifically proved. (See the case of **Alfredy Fundi v Geled Mango and 2 others**, Civil Appeal No. 49 of 2017). This position of the law is also reflected in Regulation 1(2) of the *Magistrate Courts (Rules of Evidence in Primary Court) Regulations, G.N No. 66 of 1972, which state that;*

(2) where a person makes a claim against another in a civil case, the claimant must prove all the facts necessary to establish the claim unless (that is the defendant) admits the claim.

That is to say, the respondent was supposed to prove that, he was given cows that had reproduced to a sum of 40 cows. Now from the evidence adduced in the trial court, the respondent was able to prove that indeed he was given a total of 7 cows as the evidence of SM1 to SM6 reflected the same. However, the respondent failed to prove specifically that, over the years, the 7 cows has reproduced and met a total of 40 cows as he alleged. As there was no any witness who had testified that the cows had reproduced to a claimed number.

Therefore, the 1st appellate court was right to uphold the trial court's decision that, in accordance to Regulation 6 of *Magistrate Courts (Rules of Evidence in Primary Court) Regulations, G.N No. 66 of 1972, the*



evidence adduced by the respondent was heavier compared to the appellant which is the required standard in civil cases.

However, the respondent still did not manage to prove specifically that the cows reproduced to a sum of 40 cows as alleged by the respondent. It is my firm opinion that, the 1st appellate court was right to uphold the trial court's decision regarding to 20 cows as, it is undisputed that, the respondent managed to prove that he had 7 cows that had reproduced, and failure to prove the specific amount could not confine the trial court from awarding the sum of cows by taking into consideration the number of cows and the period of time. And so it was proper for the 1st appellate court to uphold the decision of the trial court.

The same wisdom of approximating the number of cows to be paid to the respondent after he failed to specifically prove the 40 cows, was equal to what has been discussed in the case of **Elibariki Kirama Kinyama & Another vs John George a.k.a Jimmy**, Civil Appeal No. 183 of 2017 CAT Dar es Salaam, in which the Court of Appeal quoted with authority the case of **Trade Union Congress of Tanzania (TUKTA) vs Engineering System Consultants Ltd & Others**, Civil Appeal No. 51 of 2016 and hold that

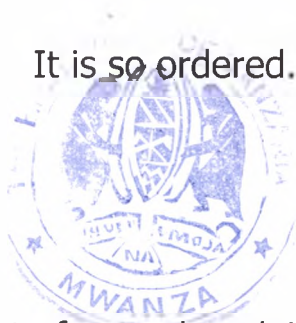
"where there is wrong there must be a remedy"



Using that principle, the Court of Appeal dismissed the specific prayer of Tshs. 210,760,000/= for failure to prove specifically but awarded Tshs. 70,000,000.00/= as the appellant managed to prove that there was a damage caused by the respondent.


Therefore, following the footsteps, I find no grounded reasons to interfere with the findings and decision of the two lower courts below. Thus, this appeal is dismissed and the decision of the trial court and the first appellate court are hereby upheld. Taking into consideration of the father and son relationship no order as to costs.

It is so ordered.




M. MNYUKWA
JUDGE
26/10/2022

Right of appeal explained to the parties.


M. MNYUKWA
JUDGE
26/10/2022

Court: Judgment delivered this 26th October, 2022 in the presence of the parties.


M. MNYUKWA
JUDGE
26/10/2022