

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MUSOMA SUB REGISTRY**

**AT MUSOMA**

**PC CIVIL APPEAL NO 76 OF 2022**

(Arising from Civil Appeal no 33 of 2022 Tarime District Court, Originating Civil Case NO 35 of 2022 Kinesi Primary Court)

**WISAHI MGANGA ..... APPELLANT**

***VERSUS***

**MUGESI WAMBURA ..... RESPONDENT**

**JUDGMENT**

20<sup>TH</sup> & 20<sup>TH</sup> April, 2023

**F. H. Mahimbali, J.:**

The appellant in this case (Wisahi Mganga) successfully sued the respondent at the trial court for a claim of 449,280/=. Aggrieved by that decision, the respondent successfully challenged the said award before the first appellate court in which it quashed the proceedings of the trial court and set aside its judgment on the basis that both parties had not closed their case which point/issue was raised by the court *suo-motto* and didn't afford the parties with the opportunity to be held.

While digesting the parties' case at the trial court, the first appellate court (hon. Myombo – PRM), made a finding that both parties at the trial court had not closed their case on that basis, he faulted the proceedings and the resulting judgment thereof without affording the parties with the right to be heard.

The appellant was aggrieved and filed three grounds of appeal namely:

- 1. That, the appellant Court erred in law and in fact by holding that the parties were not heard at the trial court merely because of the trial court Magistrate mistake to led the parties to close their respectively evidence.*
- 2. That, the appellate court erred in law and in fact for allowing the respondent's appeal having found that there were irregularities in the proceedings of the trial court instead of ordering retrial of the case at the trial court, the act which prejudiced the respondent.*
- 3. That, the appellate court erred in law and in fact by finding that the appellant did not prove her claim at the trial court, when in fact the appellant's case was proved on balance of probabilities.*

During the hearing of appeal, both parties disputed the concern of the appellate magistrate (at the District Court) that none had further

witnesses to call. Thus what was recorded by the trial magistrate was right. It appears, the first appellate magistrate was the one aggrieved instead of the parties. Worse of the matter the parties were not invited to air out their concerns on that. With respect, that is not proper as per law. That the right to be heard before adverse action or decision is taken against such a party has been stated and emphasized by this court and the Court of Appeal in numerous decisions. That the right to be heard is so basic that a decision which is arrived at in a violation of it will be nullified even if the same decision would have been arrived had the party been heard, because the violation is considered to be a breach of natural justice. See the Court of Appeal's position in the cases of **Charles Christopher Humphrey Komba vs Kinondoni Municipal Council**, Civil Appeal no 81 of 2017, **Yazid Kassim Mbakileki vs CRBD (1996) Ltd and Another**, Civil Reference No 14/04/ of 2018, **Abbas Sherally and Another vs Abdul S. H M. Fazalboy**, Civil Application no 33 of 2002 (all unreported).

Therefore, the first appellate court (Hon. Y. Myombo – PRM) erred in law in faulting the trial court's proceedings and judgment on the **suo-motto** ground that the parties had not closed their cases without affording them with the right to be heard on that. That said, the said order quashing

and setting aside the proceedings and judgment of the trial court is hereby faulted and set aside. That said, the first and second grounds of appeal are hereby answered in affirmative.

The response in these two grounds would have justified the appeal by ordering re-composition of the proper judgment by the first appellate court, however, for the interest of justice I have found it now important to step into the shoes of the first appellate court and re-evaluate evidence thereof; whether the trial court was justified to reach that finding.

In consideration of the statement of claim at the trial court (form 2) the appellant claims the following:

*"Nina mdai mdaiwa Mugesu Wambura kunilipa fedha taslimu Tshs 449,280 ambapo ng'ombe za mdaiwa walifanya uharibifu shambani kwa mdai kwa kula na kuchunga na ng'ombe ovyo na mashina yaliyoathirika ni 576 na hasara ya uhariburu huo ni kiasi cha Tshs 449,280/=. Naomba mdaiwa anilipe fedha hizo".*

During the hearing of the claims, the appellant had a total of two witnesses (herself inclusive).

In her testimony the appellant testifying as SM1, stated under oath that:

*"Ilikuwa tarehe 29/4/2022 majira ya saa kumi na mbili jioni, ng'ombe wa Mgesi (SU1) alikuja kula chakula changu nilienda kwa mwenyekiti wa kitongoji kuripoti, aliniambia nimpeleke huyo ng'ombe. Nilipofika nilimkuta mdaiwa hapo nyumbani kwangu na alinikataza nisimchukue huyo ng'ombe. Nilirudi kwa mwenyekiti kunataarifu nae alikuja kuona huo uharibifu. Hivyo ndivyo maelezo yangu."*

Joseph Nestory testified as SM2 whose testimony goes this way:

*"Tarehe 19/04/2022, nilienda kushuhudia mazao yaliyokuwa yameharibiwa na ng'ombe wa mdaiwa kwenye shamba la mdai. Mimi ni mwenyekiti wa kitongoji na nilishuhudia huo uharibifu hayo ndiyo maelezo yangu"*

Whereas the appellant maintains that her case was well established, the respondent disputes it as not well established as it is not known how that figure was arrived and that the said destruction is more perceived than real. Furthermore, the dating of the said destruction is not in certain.

According to law i.e. the Magistrates' Court (Rules of Evidence in Primary Courts) Regulations, under Rule 1 (2) provides that where a person makes a claim against another in a civil suit, the claimant must prove all the facts necessary to establish the claim unless the other party (defendant) admits the claim.

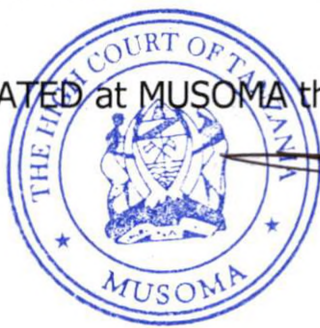
In the current matter, what the appellant was supposed to establish at the trial court was whether the said cow belonged to the respondent, what destruction the said cow caused. What is the value of the said destruction. According to the respondent's claims, what is stated into the statement of claim has not been established during the hearing of the case. This being a court of law is only expected to determine the legal issues in dispute basing on the available evidence. Unlike in criminal matters, in civil cases, the weight of evidence on a proof of a fact in issue is on balance of probabilities, i.e if the court is satisfied that the weight of evidence of one party is greater than of the other party (see rule 6 of the Magistrates' Court – Rules of Evidence in Primary Court).

Digesting the evidence of the case in the current matter, it is clear that the appellant's evidence at the trial court fell short of substance in establishing her claims. It is not clear what was destroyed and its value. The one who valued the destructed crops did not give his testimony in court and that the said exhibit was improperly tendered and admitted. Thus, the trial court was not justified to allow the said claims which were not legally established.

In a final consideration of the appeal, the decision of the first appellate court is hereby quashed and set. Furthermore, the decision of the trial court is varied for want of proof.

In consideration of the circumstances of this appeal, parties shall bear their own costs.

DATED at MUSOMA this 20<sup>th</sup> day of April, 2023.



  
F. H. Mahimbali

JUDGE

**Court:** Judgment delivered this 20<sup>th</sup> day of April, 2023 in the presence of both parties and Mr. D. C. Makunja, SRMA.

Right of appeal is explained.

  
F. H. Mahimbali

JUDGE