

THE UNITED REPUBLIC OF TANZANIA

(JUDICIARY)

THE HIGH COURT

(MUSOMA SUB REGISTRY)

AT MUSOMA

(PC) CIVIL APPEAL No. 2 OF 2022

*(Arising from the District Court of Musoma at Musoma
in Civil Appeal No. 49 of 2022; Originating from
Kiagata Primary Court in Civil Case No. 24 of 2022)*

MAGANYA MWITA APPELLANT

Versus

MORI CHACHA RESPONDENT

JUDGMENT

04.04.2023 & 25.04.2023

Mtulya, J.:

In the present appeal the record shows that **Mr. Mori Chacha** (the appellant), on 30th September 2021, had **found Mr. Amon Maganya** (Mr. Amon), Maganya Mwita's son, trespassing on his land with herds of several species of animals, including goats and cows. The appellant then arrested and brought Mr. Amon and his herd of animals to the Hamlet Chairman (HC) who drafted a letter and forwarded them to Kwisara Village Executive Officer (VEO).

The record is silent on the names of the HC and VEO. However, following the damage caused in the appellant's farmland in terms of trees and grasses, VEO ordered Land and

Forest Officers to value the damages and the officials had found a loss of 4,006,440/=Tshs.

After all necessary procedures on customary complaints handling mechanisms, the herds of animals were returned to Mr. Amon, who according to the record of appeal is a full-grown man with a wife and children residing at their own compound. According to exhibit SU.1, which was tendered before **Kiagata Primary Court** (the primary court) **Civil Case No. 24 of 2022** (the case), Mr. Amon is: *mtu mzima ana mke na watoto na anaishi kwenye kaya yake. Anaweza akashtakiwa na kushtaki*. However, the respondent had declined to sue Mr. Amon and preferred his father, **Mr. Maganya Mwita** (the appellant) for reasons reflected at page 6 of the proceedings of the primary court in the case conducted on 18th July 2022, that Mr. Amon is the son of the appellant.

The primary court noting the raised issues in the case and the contest before it, had moved further for court's inquiry to question the respondent on leaving Mr. Amon free in favor of his father. The primary court had received the following reply:

Nasema ng'ombe hizo ni za Maganya Mwita kwa sababu zipo nyumbani kwa Mdaiwa huyu. Niseme

*mipango yote ni ya mdaiwa huyu na Amoni ni
kijana wake, anazichunga.*

According to the respondent, he had approached the primary court and filed the case against the appellant to compel him to pay the indicated amount of money and costs of the case. In replying the case against him, the appellant had testified that on the indicated date of animal trespass in the respondent's farmland, he was in Mwanza Region and he had left and found his animals at his residence. According to him, from 30th September 2021 to May 2022, he had not received any complaint on cattle trespass, except in May 2022 when two villagers came to his home residence requesting him to say sorry for the trespass caused by Mr. Amon.

The appellant testified further that he has no goats in his herds and insisted that the one who is supposed to be sued is Mr. Amon, who was found at the scene of the destruction and he is a matured person capable of being sued. In his opinion, SU.1 was prepared by VEO, who is: *mlinzi wa amani na ndiye anayejua mifugo yangu*. Finally, the appellant claimed at page 19 and 20 of the proceedings of the case at primary court, conducted on 4th August 2022, that:

Nasema ng'ombe hazikuwa za kwangu na mimi sina mbuzi...Mimi Naishi Buswehili. Buswehili na Kyakoma siyo karibu. Tukio hili limetokea katikati ya Buswahili na Kyakoma. Barua imetoka Buswahili kwa sababu Mtendaji huyo ndiye kiongozi wetu mimi na Amon Maganya.

After registration of all relevant materials, the primary court, on 17th August 2022 had resolved in favor of the respondent and reasoned at page 6 of the judgment that:

*...ngombe walioharibu nyasi, miti, na kukanyaga ardhi ya Mdai ni wa Mdaiwa na kwa sababu hakuna ubishi kwamba **Amon Maganya alikuwa anachunga ng'ombe hao ni mtoto wa mdaiwa basi Mahakama inasema mdaiwa hakishtakiwa kimakosa** bali alishtakiwa kama mmiliki wa ng'ombe zilizofanya uharibifu, **tena mtu ambaye yupo katika nafasi ya kulipa gharama za uharibifu huo.***

(Emphasis supplied).

The judgment of the primary court frustrated the appellant hence rushed to the **District Court of Musoma at Musoma** (the district court) and filed five (5) reasons of appeal in **Civil Appeal**

No. 49 of 2022 (the appeal) for the district court to overturn the decision of the primary court in the case. The reasons briefly show that: first, the cows complained of did not belong to the appellant; second, wrong marking of the cows; third, the primary court did not consider evidence in exhibit SU.1; fourth, the primary court did not visit appellant's hooves to ascertain the cows' marks; and finally, the cows or documents justifying the arrested cows were not brought and tendered in the primary court as exhibit to establish the case. After hearing the parties in the appeal, the district court had decided against the appellant and found the appeal to have no any merit whatsoever. The reasoning of the district court is found at page 8 of the decision, that:

Weighing the evidence of these two parties, I am in consensus with the primary court findings that the evidence of the respondent is heavier compared to that of the appellant. The suit against the appellant was proved to the required standard. Appellant provided weak evidence to prove that the cows caused destruction are not his. He failed to summon that Amon Maganya to come and help him to prove otherwise.

The judgment and reasoning of the district court aggrieved the appellant hence preferred second appeal in this court and registered five (5) grounds of appeal in **(PC) Civil Appeal No. 2 of 2022**, which in brief show that: first, the cows which caused destructions did not belong to the appellant; second, the district court failed to consider cows' marks; third, the respondent failed to summon the hamlet chairman; fourth, the district court did not consider visitation of the appellant's cow shed; and finally, the complained cows or documents justifying existence of cows were not tendered in the primary court.

In this court, both parties have decided to invite learned minds of **Mr. Emmanuel Werema** and **Ms. Mary Joakimu** to argue the appeal on their behalf. According to Mr. Werema, the trial court erred in holding that the complained cows belonged to the appellant while the appellant constantly insisted that the cows do not belong to him and that Simon Maganya was arrested at the crime scene without any prosecution. In the opinion of Mr. Werema, the responsibility of the son cannot be transferred to the father, and that even if the cows belonged to the appellant, there were no evidence produced during the hearing showing the cows belonged to the appellant.

Mr. Werema submitted further that the record is silent on the number of cows and goats, colours of the cows and goats, species of the cows and goats hence it is difficult to ascertain the extent of damages caused by the complained cows and goats. According to him, even the extend of damages in exhibits produced by the prosecution witness are at different sizes in land acres from two point five (2.5) to nine (9), and the valuation reports were prepared after twenty-six (26) days which invite doubts on certainty of the reports.

Replying the submission, Ms. Joakimu submitted that the respondent had proved before the trial court that the cows belonged to the appellant as it was displayed by PW4 and PW5 in the record. According to Ms. Joakimu, the appellant had denied ownership to escape liability and had declined to cross examine PW4 and PW5 on the subject of ownership, which is considered to have admitted the facts. In moving this court to appreciate her submission, Ms. Joakimu had cited the authority in **Rashid Sarufu v. Republic**, Criminal Appeal No. 467 of 2019.

In her opinion, this court cannot interfere the concurrent decisions of two lower courts, unless there are good reasons to do so or a point of law as it was directed in the precedent in **Shadrack William v. Republic**, Criminal Appeal No. 292 of 2019.

Regarding the delay of twenty-six days in preparation of the valuation reports, Ms. Joakimu contended that it was caused by procedures in each government offices. Finally, Ms. Joakimu submitted that the respondent's evidence were heavier than that of the appellant at the primary court and the respondent had met the threshold standard set in the decision of **Hemed Said v. Mohamed Mbilu** [1986] TLR 370.

Rejoining the submission, Mr. Werema submitted that the cited authorities in precedent allow intervention of this court where there is misappropriation of evidence on record or violations of principles of law or miscarriage of justice. In his opinion, this court is asked to reply whether the cows belonged to the appellant or whether the appellant can be responsible for actions of his son. Finally, Mr. Werema contended that Ms. Joakimu had produced criminal cases in civil case contrary to the practice of courts.

I have perused the materials produced by PW4 and PW5, which Ms. Joakimu claims that they link the appellant with the complained cows and goats. The evidence of PW4 as reflected at page 13 and 14 of the typed proceedings shows that:

***Niliwatambua ng'ombe hao kuwa ni wa Mdaiwa
na walikuwa wanachungwa na Amoni Maganya***

*ambaye ni mtoto wa Mdaiwa...wewe tupo vijiji
Jirani...mifugo yake ina alama ya moto ya herufi za
MM...wewe si Amoni Maganya. **Wewe ni Maganya
Mwita, baba wa Amoni aliyekuwa anachunga
ng'ombe wako...***

(Emphasis supplied).

On the other hand, the evidence of PW5 is displayed at page 15 of the typed proceedings shows that:

*...ndipo tulipomuona mdai na watu wengine na
ng'ombe na mbuzi wa Mdaiwa huyu na kijana wake
aliyekuwa akiwachunga anayeitwa Amon
Maganya...wakati tumefika, walikuwepo ng'ombe
na mbuzi. **Ng'ombe wale waliwatambua kuwa ni
wa mdaiwa huyu ila wakiwa wakichungwa na
Amon Maganya, mtoto wa mdaiwa. Mbuzi
walisemekana ni wa Chacha Okombo...nilitambua
kuwa ng'ombe ni wako kwa sababu wanachapa
yako, alama MM...ndiyo maana baadaye ulifufua
kesi ya jinai kwamba warithi wa Mdai walimpiga
Amon Maganya...kesi hiyo iliendeshwa na Amon,
lakini wewe ndiye uliyefungua...***

(Emphasis supplied).

I have scanned the record of present appeal regarding the dispute which this court is invited to determine, and found that Mr. Werema is correct that the issue is: whether the cows and goats which had caused damage in the respondent's land belonged to the appellant. If the question is replied in affirmative, the second question is whether the appellant is responsible for action of his adult son in taking the cows and goats to the respondent's farm.

It is fortunate that the primary court had noted the dispute and drafted issues at page 3 of the typed proceedings conducted on 18th July 2022, which show that: first, *endapo mifugo ya Mdaiwa iliharibu mali ya Mdai*; second, *endapo mali iliyoharibiwa ina thamani ya Tshs. 4,066,440/=*; and finally, *nini haki ya kila upanda*. The trial court had resolved the first issue in affirmative. The issue was brought again at the district court as is reflected at page 5 of the judgment of the district court and was resolved in affirmative that the cows and goats belonged to the appellant.

In this court the same question is raised regarding materials linking the appellant with the ownership of the cows and goats. According to Mr. Werema the Mr. Amon is an adult person who was found grazing at the respondent's farmland, but the respondent had declined to prosecute him and favored his father

without any evidence of ownership, whereas Ms. Joakimu thinks that there are materials from PW4 and PW5 pointing fingers to the appellant as the owner of the cows and goats. It is unfortunate that the record is silent on why Mr. Amon Maganya was not prosecuted or joined as party by the respondent. Instead, both lower courts think that the appellant was responsible for calling Mr. Amon as witness to testify on the ownership of cows and goats. The primary court thought at page 5 of the judgment that:

*Ukiacha kushindwa kupinga alama MM ama kueleza
ng'ombe wake wana alama gani, pia mdaiwa
hakueleza Mahakama kwamba Amon Maganya
hapatikani. Hivyo hawezi kufika Mahakamani kama
shahihidi wake ama kuwa Mdaiwa Mwenza.*

The district court cemented on the issues at its page 8 of the judgment that the appellant had declined to call Mr. Amon to prove that the cows and goats did not belong to the appellant and on such failure, the appellant's evidence is weak.

In my considered opinion, this is certainly a shift of responsibility in proving civil cases from the respondent who initiated the case to the appellant who was responding on the raised issues. The duty is always to the claimant to prove its

case, unless the case shift for good reasons. It is the respondent who claimed to have found Mr. Amon with the herd of cows and goats in his farmland, arrested him and brought him before hamlet chairman and later had returned the same domestic animals to Mr. Amon Maganya, an adult person. It is uncertain why the respondent had declined to sue Mr. Amon for damage caused in his farmland. In his testimony, he remained mute on why he moved for the appellant. However, the trial court thought at page 6 of the judgment that: *[ni] mtu ambaye yupo katika nafasi ya kulipa gharama za uharibifu huo*. It is unfortunate the first appellate court had insisted on the stand, which is contrary to the law regulating civil suits.

In the present appeal it is vivid that the appellant is held responsible for action of his adult son. The law in precedents regulating such circumstances has been in practice since colonial time, when this court had resolved a dispute between **Gwao bin Kilimo** against **Kisunda bin Ifuti** reported in (TLR) Criminal Revision No. 1 of 1938 page 403. This court, then held that:

It is against general ideas of justice that a man should suffer or be punished directly either in person or in property for some wrong which he has not done himself.

In the indicated precedent, Gwao had objected to the attachment of his two heads of cattle by Kisunda in execution of a decree passed against his son, Mange. The position and thinking of this court since then have been that every grown-up person should be personally held responsible and accountable for his actions. There is a bunch of precedents in favor of the position (see: **Chikumbi Chilomo v. Madaha Mganga** [1986] TLR 247; **Kazungu Lushinge V Juakali Degulla** [1986] TLR 98; **Meta Tebera v. Isakwe Rongoya** [1967] H.C.D.119; **Masero Mwita v. Rioba Masero** [1968] H.C.D. 199; **Mariba Wanyangi v. Romara** [1977] LRT 7; and **Rashid Neyura v. Athumani Mayunga** (PC) Civil Appeal No. 88 of 1982 (Mwanza).

In the precedent of **Chikumbi Chilomo v. Madaha Mganga** (supra), this court thought that:

The respondent has no obligation whatsoever in law to have his 17 heads of cattle attached in order to satisfy a compensation order made against Yona Mganga, simply because the two were brothers. This would be against the general ideas of justice

The facts of the precedent display that one person called **Yona Mganga** was convicted by the **Mpwapwa District Court** for having burgled the appellant's house and to have stolen

therefrom property of the appellant. He was sentenced to and was also ordered to pay compensation to the appellant. In executing the compensation order, the appellant went to attach some 17 heads of cattle from the respondent, simply because he claimed that the respondent was a brother to Yona Mganga. The respondent objected to this unlawful attachment, and the **Urban Primary Court of Mpwapwa** had found for him. The appellant was ordered to return the 17 heads of cattle to the respondent. Dissatisfied with the decision of the Primary Court, the appellant went to the District Court of Mpwapwa on appeal. He lost the appeal. He further protested the decision to this court and this court had resolved that it is against general ideas of justice that a man should suffer or be punished directly either in person or in property for some wrong which he has not done himself.

Similarly, in the case of **Kazungu Lushinge v. Juakali Degulla** (supra), this court had resolved that:

any custom where a person is punished or is made to part with his property on account of the independent acts of another adult person is contrary to the principles of natural justice which must override any such custom.

The facts in the dispute show that the respondent had obtained judgment against the appellant's son. The latter was required to pay 30 bags of millet or its equivalent value in money. In settlement of the judgment debt the respondent applied to court for the attachment of the appellant's cattle. The court allowed the application on the basis of a custom which was said to exist among the Sukuma tribe that a father could be required to settle the debts of his son. Dissatisfied with the decision, the appellant appealed to this court and the determination was obvious as indicated above.

In the present appeal, record shows that the appellant was brought before the primary court to reply wrongs committed by his son, Mr. Amon, which is not cherished by the law in the indicated precedents. I am aware PW4 and PW5 during proceedings claimed the cows and goats had MM marks to show that they belong to the appellant. However, there are no record from the hamlet chairman or the respondent showing the cows and goats were in MM marks. Even if we assume the cows and goats had MM marks, still it that may not necessarily reflect the reality on ground that the domestic animals belonged to the appellant. There must be other corroborating evidence which link MM with the appellant.

Additionally, the evidence of PW5 is quietly shaking. During examination in chief, he stated that: *Ng'ombe wale waliwatambua kuwa ni wa mdaiwa huyu ila wakiwa wakichungwa na Amos Maganya, mtoto wa mdaiwa* whereas during cross examination he testified that: *nilitambua kuwa ng'ombe ni wako kwa sababu wanachapa yako, alama MM*. Similarly, to PW4 who had testified that: *tulipofika tulikuta mdai akilalamika kwamba ng'ombe na mbuzi wa Mdaiwa wameingizwa katika shamba lake na kula miti na nyasi zake bila ridhaa yake*. However, PW4 remained silent on how he managed to identify marks MM and any relation between the appellant and Marks MM, until when prompted during cross examination when he stated that: *mifugo yake ina alama ya moto ya herufi za MM*. The testimonies of PW4 and PW5 are in doubt and shake their credibility and reliability.

It is also unfortunate in the present dispute, a key witness hamlet chairman was not brought to produce relevant materials with regard to the number and species of cows and goats with marks MM and hamlet mandate in recording of animals' marks. Even if that is left unattended, the evidences in valuation reports in exhibits M.1 produced by PW1 and M.2 admitted by PW2, show discrepancies of areas of destruction from nine (9) acres to two point five (2.5) acres respectively, whereas M.3 tendered by

PW3 is silent on the size of destruction. Still, the exhibits were prepared several days after the event, namely 6th October 2021, 25th October 2021 and 30th October 2021. For an area being destructed by domestic animals for such a delay, the valuation reports may not provide realistic data.

It is for the above reasons that this appeal must be allowed as I hereby do so. I therefore set aside decisions of the district and primary court decisions for want of best practice of this court. I need not be detained resolving other reasons of appeal as the result is obvious an academic one. This appeal is allowed without costs as the parties were lay persons influenced by their customs and traditions.

Accordingly ordered.



F. H. Mtulya

Judge

25.04.2023

This Judgment was issued in Chambers under the Seal of this court in the presence of the appellant, **Mr. Maganya Mwita** and in the presence of the respondent **Mr. Mori Chacha.**

F. H. Mtulya

Judge

25.04.2023