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

**[IN THE SUB-REGISTRY OF ARUSHA]**

**AT ARUSHA**

**PC CIVIL APPEAL NO. 37 OF 2023**

(Originating from Civil Appeal No. 15/2023 at Arumeru District Court, and Civil Case No. 75/2022 at Enaboishu Primary Court)

**LIALO LOINYENYE.....APPELLANT**

**Versus**

**LOMITU LOINYENYE.....RESPONDENT**

# JUDGMENT

15th April & 24th May 2024

**TIGANGA, J.**

This is a second appeal from the judgments of the Arumeru District Court and its Primary Court at Enaboishu in Civil Appeal No. 15 of 2023 and Civil Case No. 75 of 2022 respectively. The background leading to the dispute depicts the complaint or rather a claim lodged by the respondent before Enaboishu Primary Court claiming for the Appellant to return the trailer and tractors hallow or to pay to the Respondent a sum of Tshs. 5, 500, 000/= which is the value of the said trailer and hallow. The claimed properties are said to be the properties of the late Loinyenye Lekingorie Lukumay, the deceased, which were collected by the appellant from the family of the deceased on the pretext that he was allowed to collect them by the administrator of the

estate with the promise of subsequently returning them, which he did not.

It was alleged that the Appellant took both the trailer and the tractors hallow, from their father's premises without authorization from the Administrator of the deceased estate. Also, even when he was required to return the same or their equivalent value he refused. That resulted in filing the suit before the trial Court but he did not succeed either. That was after the court had weighed the evidence of both parties and found that of the appellant to be heavier than of the respondent, thus resulting in the dismissal of the claim for want of merits.

The decision of the trial Court did not amuse the Respondent, he preferred an appeal to the Arumeru District Court seeking for the District Court to overturn the decision of the trial Court. His grounds of appeal were as follows:

1. *That, the trial magistrate erred in law and in fact for failure to scrutinize and analyse the evidence brought before her and consequently reached to an erroneous decision.*
2. *That, the trial magistrate erred in law and in fact for unjustified rejection to visit the locus as requested by the appellant herein*

*hence accorded higher probative value on testimony of the respondents.*

The appeal was opposed by the appellant who insisted on not taking the trailer and the tractors hallow from the deceased premises. He also denied owing anything to the Respondent as claimed. The Appellant contended the Respondent to have failed to prove the case on the balance of probabilities.

Having heard both parties, the second appellate court held in favour of the Respondent and ordered the Appellant to pay the claimed amount i.e, five million and five hundred thousand (5, 500, 000/=) or to return the trailer and hallow to the custody of the appellant and the costs.

Aggrieved by such a decision, the Appellant came to this Court armed with four grounds of appeal as reproduced hereunder:

1. *That the 1st appellate court erred in law and facts by failure to consider the evidence submitted by the appellant, that there was a criminal case on the same subject matter in which he was acquitted.*
2. *That, the 1st appellate court erred in law and fact by ordering the appellant to pay 5, 500, 000/= or return the tractor-trailer in the custody of the Respondent while there is no justification*

*or evidence as to whether the property is in the custody of the appellant.*

3. *That the 1st appellate court erred in law and facts for failure to demonstrate the evidence and facts regarding the visitation of the locus in quo, as it is the duty of the parties to give reasonable evidence.*
4. *That, the 1st appellate court erred in law and facts by not considering the decision delivered by Enaboishu Primary Court in Criminal Case No. 9 of 2022.*

When the appeal was set for hearing, the Appellant was represented by Ms. Caroline N. Mollel, learned Counsel whilst Mr. Samwel L. Ndanga, learned Counsel advocated for the Respondent. With the leave of the Court, the Appeal was argued by way of written submissions. Submitting in support of the first ground of appeal, Ms. Caroline argued that, it is a rule that the record of conviction in a criminal case is admissible in subsequent civil cases as *prima facie* evidence of the facts stated therein. She argued that the 1st appellate Court should have considered the fact that, there was a criminal case involving the same cause of action against the appellant while deciding to avoid double jeopardy to the appellant. She contended that there is an element that the respondent wants to benefit from the cases and takes whatever measure he has to implicate the appellant.

Supporting the second ground of appeal, she asserted that it is a trite law that whoever alleges must prove. She cited section 110 (1) of the Evidence Act [Cap. 6 R.E 2019]; which provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of a fact which he/she asserts, must prove that those facts exist. She supported that legal proposition by citing the case of **Barelia Karangirangi vs Steria Nyalwamba,** Civil Appeal No. 37 of 2017, CAT (Unreported). She contended that the respondent had a duty to prove that the tractor-trailer was in the custody of the Appellant and it was worth Tsh. 5, 500, 000/= as stated in the trial Court's records. Ms. Caroline submitted further that, the appellant was unable to establish that it was the appellant who took the trailer and it was in his custody to date. However, the witnesses he brought contradicted themselves as to who brought back the tractor's trailer.

She argued further that, the appellant contended that the tractor's trailer is still at the same place as the deceased had been sharing it with Lunoni Ming'ari, the fact which was supported by SU2, SU3, and SU4.

In the same line, Ms. Caroline contented that, the decision of the 1st appellate court of finding the respondent responsible and ordered him to pay the stated amount or return the tractor-trailer hallow while

there was no evidence as to the whereabouts of the trailer. Since there was no proof an order compelling the appellant to produce the said property was not justified. This finding has taken into regard the fact that there was Criminal Case No. 9/2022, once filed at Enaboishu Primary Court, concerning the same tractor trailer which the respondent also failed to prove thus resulting in the acquittal of the appellant as proved by the exhibit tendered during trial.

She argued further that, the 1st appellate court found the trial court's failure to visit locus in quo, could have cleared the controversy as to the whereabouts of the tractor-trailer. Unfortunately, the 1st appellate court gave an order based on the same findings led to a miscarriage of justice. Having so submitted, she prayed for the appeal to be allowed, the decision of the 1st appellate court to be set aside, and the respondent to be condemned to pay costs. He did not argue the 4th ground of appeal.

In response, Mr. Samwel Ndanga, a learned Advocate for the respondent strongly opposed the appeal. He submitted in opposition to the first ground of appeal that, the appellant complained about the existence of the criminal case, however, he contended that the trial court records reveal that the allegation to be an afterthought. He opined that

the appellant raised a new issue which was not canvassed during trial. He reminded the Court of a trite law that appellate courts do not take new evidence but rather deal with the evidence on record. He submitted further that, proceedings are regarded as perfect and containing a true account of what transpired in court. He cited **Halfani Sudi v Abieze Chichili** (1998) TLR 527 to cement his assertion. In his view, the existence of the alleged criminal case cannot affect the credibility of the evidence adduced by the appellant in the trial court in civil cases. He contended that court practice prohibits matters not raised and argued at the trial court to be raised as a ground of appeal to nullify the decision of the trial court. He also referred to the case of **Hassan Bundala Swaga v R,** Criminal Appeal No. 416/2014, and **Diha Matofari v R,** Criminal Appeal No. 245/2015

Addressing the second ground of appeal, where the appellant complained to pay Tshs. 5, 550, 000/= or return the tractor-trailer to the custody of the Respondent. He argued that the core issue is whether the respondent successfully proved his case on the balance of probabilities. He asserted that it was illegal for the appellant to cite the **Law of Evidence Act** (Cap. 6 R.E 2022) which is inappropriate for a matter that started from the Primary Court. He averred that the law which is

applicable for the matter originating from the Primary Court is the **Magistrates Courts (Rules of Evidence in Primary Courts) Regulations,** [GN No. 22 of 1964 read together with GN. No. 66 of 1972.]

He argued further that, it is a trite law that, in civil cases, the complainant shall prove her/his case on the standard balance (sic), as propounded under Rule 1 (2) of the **Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations**, GN No. 22 of 1964 read together with GN. No. 66 of 1972]. According to him, the records show that before the trial court, the respondent had successfully proved his case. He submitted that the respondent is the administrator of the estate of Loinyenye Kingori, whose duty was to collect the properties of the deceased including the trailer which was confiscated by the appellant herein. He stated further that the trailer belonged to the deceased the Respondent is the administrator, and he was on duty to collect the deceased properties.

Responding to the third ground of appeal, which is centered on the issue of visitation of *locus quo,* he argued that the respondent prayed to the court to visit *locus in quo* to ascertain the existence of the tractor-trailer taking into consideration the harrow is incapable of transported to

the court. He contends that it was important for the court to visit the *locus in quo* to clear the doubts about the existence of the subject matter. It is questionable as to why the court declined and ignored to visit the *locus in quo* at the costs of the respondent. He cited the case of **Nizar M.H v Gulamali Fazal Jarumohamed** (1980) T.L.R 29 and asserted that the denial to visit it was tantamount to the denial of the right to be heard under Article 13 (6)(a) of the Constitution of the United Republic of Tanzania, 1977. He argued that where a visit to a *locus in quo* is necessary/appropriate, the court should visit with the parties and their advocates. He referred to the case of **Mbeya Rukwa Autoparts Transport Ltd vs Justina Mwakyoma** (2003) T.L.R 281. To support his proposition and prayed for the appeal to be dismissed with costs.

Rejoining the respondent's submission, Ms. Caroline Mollel Advocate, submitted that the respondent herein complained against the appellant for an offence of theft of the tractor-trailer worth 5, 500, 000/= Tshs, in Criminal Case No. 09/2022 at Primary Court of Arumeru, at Enaboishu before Hon. Athuman – RM, the judgment was pronounced on 29th April 2022, and the court found the appellant not guilt of the offence and acquitted him.

She went further and cited the provision of section 43 A of the Law of Evidence Act [Cap 6 R.E 2019], which provides that a final judgment of a court in any criminal proceedings shall, after the expiry of the time limit for an appeal against that judgment or after the date of the decision of an appeal in those proceedings, whichever is later, should be taken as conclusive evidence that a person convicted or acquitted was guilty or innocent of the accusation to which the judgment relates.

She argued further that, looking at the proceedings of the trial court, the appellant gave evidence that the respondent filed a criminal case, and the appellant was acquitted as proved by exhibit marked "A Mdaiwa". That being the case, the decision of the 1st appellate court to find the appellant responsible was improper while there was proof of a criminal case on the same subject matter in the court records.

She rejoined further that; the testimonies given by the Respondent's witnesses were contradictory as they could not establish who brought the trailer back from Launoni Ming'arai who was farming in shares with the deceased. There is neither proof nor justification that the tractor-trailer was in the custody of the appellant. He referred to the case of **Mohamed Said Matula v Republic**, (1995) TLR 3.

Having gone through the submissions by both parties. It is important to note at this juncture that, the fourth ground of appeal has been abandoned by the appellant, therefore I will as well not address it.

Also, before going to the merits of the appeal, I find it apt to make some legal issues raised by the parties clear. I entirely agree with the counsel for the respondent Mr. Samwel Ndanga that the Evidence Act. [Cap. 6 R.E 2022] does not apply in the proceedings originating from the Primary Court. I agree that the applicable law is the Magistrate Court (Rules of Evidence in Primary Courts) Regulations [GN. Nos. 22 of 1964 and 66 of 1972]. However, the principles of burden and standard of proof contained under both laws are similar therefore the authoritative decision in the interpretation of either of them is relevant in any case.

Regarding the first ground of the appeal, the appellant is trying to convince this court to find though not in express terms that the matter was res judicata due to the fact that the appellant was once charged and acquitted. It is the trite principle that the doctrine of res judicata as stated in the case of **R v. Mwalongo [1960] EA 758 (HC)**, prohibits further actions over the same subject matter where the same has already been decided by the competent Court. However, that is the principle applicable in civil cases only, it does not apply in criminal cases.

It is worth noting that the principles of civil and criminal law are not the same. A similar principle in criminal law is *autrefois acquit* or *autrefois convict*. Since these principles are quite different, then a person acquitted in a criminal case can still be sued and held liable in a civil case if the standard of proof is satisfied. In criminal law, the standard of proof is beyond a reasonable doubt, while in civil cases, it's on the balance of probabilities.

Now the task before me is to determine whether the respondent has met the standard of proof in a civil case to be entitled to the claim.

In the present case, the trial court records reveal that the evidence provided by the respondent has failed to prove his claim on the balance of probabilities. There is no agreement tendered, nor proof that the Appellant took the said tractor trailer from the deceased premises. It is just mere words from the appellant on records upfronted to befall liability on the appellant.

It is the cardinal law and principle that, he who alleges must prove. In the **Paulina Samson Ndawavya vs. Theresia Thomas Madaha,** Civil Appeal No. 53 of 2017, CAT (unreported), having stated:

> *"...It is equally elementary that since the dispute was in a civil case, the standard of proof was on a balance of*

*probabilities which simply means that the Court will sustain such evidence which is more credible than the other..."*

See also the cases of **Anthony M. Masanga vs Penina Mama Ngesi and Another**, Civil Appeal No. 118 of 2014, (unreported), **Godfrey Sayi vs Anna Siame, (As Legal Representative of the Late Mary Mndolwa**,) Civil Appeal No. 114 of 2012, and **Mathias Erasto Manga vs Ms. Simon Group (T) Limited**, Civil Appeal No. 43 of 2013 (all unreported). In the latter case the Court among other things, stated that:

*'...the yardstick of proof in civil cases is the evidence available on record and whether it tilts the balance one way or the other..."*

According to the evidence on record, in the entire trial court records and the first appellate court, the standard of proof was not met by the respondent to justify the order he was given by the 1st appellate Court. After the respondent failed in a criminal case to prove theft, he was expected to bring more cogent evidence to prove the existence of both the trailer and hallow, and that they were the properties of the deceased. He was also required to prove that the appellant, took the trailer and hallow, from the premises of the deceased. It was also required to be proved that the appellant did so unjustifiably, and go

further trace where he took the said properties after collecting them from the home of the deceased.

It is a well-known principle as already pointed out, that the appellant's acquittal in the criminal case did not automatically exempt him from civil liability, for failure to meet the standard of proof in criminal cases does not necessarily mean that there was no evidence to prove the civil claim to the required standard. However, the respondent's institution of a civil case on the same subject matter and an attempt to re-litigate the same issues in civil cases was a giving him a second chance. However, his failure to parade the evidence to prove the claim insinuates that there is no evidence to prove the claim. That said, I find the first ground to have merit and allow it.

In respect of the second ground of appeal which raises a complaint that *"the 1st appellate court erred in law and fact by ordering the appellant to pay 5, 500, 000/= or return the tractor-trailer in the custody of the Respondent while there is no justification or evidence as to whether the property is in custody of the appellant."* this will not take much of my time as the discussion in the first ground has substantially covered it. However, for purposes of being more elaborate, I will say a word or two, my examination of the evidence on record has revealed

that the Appellant's evidence is mere words without proof that, the tractor-trailer was the property of the deceased, and that it was collected and taken by the appellant, and it is in the actual possession of the appellant and the respondent, also failed to prove that the value of the trailer is Tshs. 5, 500, 000/=. This ground is also merited, for that reason I allow it.

Regarding the third ground of appeal which raises the complaint for the failure of the trial court to visit the *locus in quo.* I have gone through the proceedings of the trial court, on page 22 of the typed proceedings, I saw the request of the plaintiff's Advocate to visit the *locus in quo.* That request was rejected by the trial court because the property is moveable, and the defendant is not ready to incur the costs.

In my considered view, visitation to the locus in quo was not necessary as there was nothing to verify at the *locus in quo*. In law, visiting the *locus in quo* is not a mandatory requirement, it should be done in few and exceptional cases where it is necessary and the properties involved are immovable. Where the properties are movable, the parties have to move that evidence and bring the same to court. As a matter of principle, courts should strive to avoid the temptation of involving themselves in evidence-searching, a danger that turns it into a

witness of the case. In the case of **Nizar M. H. vs. Gulamali Fazal Jarimohamed [1980] TLR 29**, the Court of Appeal of Tanzania held *inter alia* that:

> *"It is only in exception circumstances that a court inspects a locus in quo, as by doing so a court may unconsciously take on the role of a witness rather than an adjudicator."*

Therefore, in the circumstance of the case at hand, it was not necessary to visit the *locus in quo*. The trial court magistrate was justified not to allow the request. That said, I find the third ground of appeal to have failed as well for want of merits. In the final analysis, I find the first, second, and third grounds of appeal merited. I quash the decision and orders of the 1st appellate court. I uphold the decision of the trial court to the extent and reasons stated herein above. The appeal at hand has merits it is allowed with costs. It is accordingly ordered.

**DATED** and delivered at **ARUSHA** this 24th May 2024.

**J. C. TIGANGA**

**JUDGE**