

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

(APPELLATE JURISDICTION)

PC. CIVIL APPEAL NO. 07 OF 2017

(Arising from Civil Appeal No. 03 of 2017 of Maswa District Court (F.R. Lukuna, RM);
Original Civil Case No. 07 of 2016 of Malampaka Primary Court)

MGAMBULA NG'HOME.....1ST APPELLANT
ZENGO KIBIKIBI.....2ND APPELLANT
EMMANUEL MARCO.....3RD APPELLANT

VERSUS

NONGA MACHEMU.....RESPONDENT

Date of Last Order: 23.10.2018
Date of Judgment: 21.12.2018

EX-PARTE JUDGMENT

V.L. MAKANI, J

This appeal is against the decision of Maswa District Court in Civil Appeal No. 03 of 2017 (F.R. Lukuna, RM). The case originated from Malampaka Primary Court in Civil Case No. 07 of 2016.

At the Primary Court (trial court) the respondent was claiming TZS 2,000,000/= being compensation for the damage of trees and fruits following the invasion of the respondents livestock in the respondent's farm. The respondent had three witnesses including himself and the appellants had five witnesses including themselves. The respondent alleged that the cows of the 1st and 2nd respondents

damaged his trees and the destruction was evaluated by the Agricultural Officer to the value of TZS 2,000,000/=. The appellants denied the allegation stating that on the date of the invasion 02/11/2016 they had no cows. The cows were received by the 2nd respondent on 07/11/2016 and brought to the 1st appellant on the following day. So the allegation was not true. The trial court found that the respondent had proved his case and ordered compensation of TZS 800,000/= and costs at TZS 5,000/=.

The District Court upheld the decision of the trial court.

The appellants were dissatisfied with the decisions of the lower courts hence the appeal before this court with eight grounds of appeal. The grounds of appeal, which are substantially in the form of submissions, had one main complaint that the Primary and the District Courts did not properly evaluate the evidence on record.

When the appeal was called for hearing the respondent did not enter appearance. There was a letter from the Chairman of Lali Mataba hamlet one Maduhu Ligwa dated 30/05/2018 informing the court that the respondent passed away on 04/02/2018 and that his family is not interested in pursuing further this case as no one in the family intends to apply for letters of administration of the estate of the respondent. The widow of the respondent affixed her thumbprint to ascertain the contents of the said letter. Subsequent to this development and with leave of the court, the appeal proceeded in absence of the respondent and or his administrator.

The appellants chose the 2nd respondent Zengo Kibikibi to submit on their behalf. He said the accusations by the respondent were not true. He said on the date of the incident on 02/11/2016 the 1st appellant did not have any cows. He said the 1st appellant got the cows on 07/11/2016 and were brought to him on 08/11/2016. He said the allegations by the respondent that the 1st respondent's cows damaged his trees and fruits could not be true. He said there is no proof that would warrant them to pay TZS 800,000/= as compensation for damaged crops. He said the trial court and District Court erred in their decision. He prayed the appeal to be allowed. He said the cows belonged to him and the 1st appellant and the 3rd respondent was the cowboy.

Before considering the appeal on its merits I wish to point out that this is a second appeal and this court can only interfere with the concurrent findings of facts of the courts below if it is shown that there is misdirection or non-direction on evidence or completely misapprehension of the substance, nature and quality of evidence resulting in unfair conviction (see **DPP v. Jafari Mfaume Kawawa (1981) TLR 149**; and **Salum Mhando v. Republic [1993] TLR 170**). In the case of **Salum Mhando** (supra) the Court held:

"If as in this case both courts completely misapprehend the substance/nature and quality of the evidence, resulting in an unfair conviction, this ... Court must in the interests of justice intervene."

Having gone through the record of the lower courts, I strongly feel that there were important areas that the courts below failed to address and I respectfully think that had the courts seriously considered these areas they may have come to a different conclusion.

At the trial court the respondent's witness SM3 Yohana Msuka, who is the Natural Resource Officer of the Ward (Afisa Mali Asili wa Tarafa) testified that he did not see cows being grazed in the farm and that he did not see the damage because he went to the site on 03/11/2016. In his evidence he said "*Mimi Ng'ombe sikuwakuta bali niliambiwa na SM1 na SU3 alikuwa Mchungaji....**sikuona uhariabifu**, na mimi nilienda tarehe 03/11/2016*". Now, it is surprising that the same witness who was not at the scene to witness the cows being grazed in the farm, and he did not evidence any destruction at the scene could assess the damage at TZS 2,000,000/=. If there was no destruction as testified by the witness then the assessment was imaginary it could not have been genuine.

Further in the judgment of the trial court the trial magistrate was not sure of the evidence given because in his reasoning he said in the third issue, maybe the 1st and 2nd appellants invaded the respondent's farm; and in the fourth issue he said maybe the cows destroyed the respondents crops. Since there was uncertainty on the evidence given it is apparent that balance tilts in favour of the appellants. In other words, the allegations that were raised by the respondent were not proved to the standards required by the law. In

the absence of substantial evidence it was not safe to declare that there was destruction resulting to assessment of compensation. The lower courts therefore erred to have awarded compensation to the respondent.

For the reasons above, the appeal has merit and it is hereby allowed. The decision of the District Court is quashed and set aside. There shall be no order as to costs.

It is so ordered.

