IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

PC CIVIL APPEAL NO. 54 OF 2022

(C/F Arumeru District Court, Civil Appeal No. 42 of 2021, originating from Enaboishu Primary Court in Civil Case No. 81 of 2020)

MEPARALI LESINET.....APPELLANT

VERSUS

ABDI TUKE.....RESPONDENT

JUDGMENT

29/05/2023 & 24/07/2023

MWASEBA, J.

Meparali Lesineti, the appellant herein is challenging the judgment of the 1st appellate court which upheld the decision of Enaboishu primary Court in Civil case No. 81 of 2021, and dismissed the entire appeal with costs. The claim involved in this case is the compensation payment following the appellant's cattle trespassing into the respondent's land and destroying the grasses for processing cattle nourishment.

The background story leading to his case is that the respondent alleged that on 27/06/2021 he received a phone call informing him that the appellant's cattle trespassed into his land and destroyed his grasses for

processing cattle nourishment. He reported the matter to the Village Executive Officer (VEO) where the appellant was summoned and admitted the allegation. Thereafter the appellant promised to pay Tshs. 750,000/= as a compensation for the destruction done by his cattle. On that day the appellant paid Tshs. 200,000/= and promised to pay the remaining amount of Tshs. 550,000/= within two weeks but he never did so. Non-compliance with his promise prompted the respondent to file a claim of Tshs. 10,000,000/= at the primary court following the said destruction. At the trial court, the appellant admitted that at the VEO the respondent wanted Tshs. 750,000/= but he paid him Tshs. 200,000/= for keeping peace as neighbours but he disputed the rest of the amount.

The trial court after hearing both parties allowed the claim in the respondent's favour and ordered the appellant to pay the remaining amount of Tshs. 550,000/=. Aggrieved, the appellant unsuccessfully appealed to Arumeru District Court where the appeal was dismissed with costs. Hence, the present appeal.

The appellant preferred his appeal based on nine (9) grounds of appeal whereby the memorandum of appeal had six grounds and the additional grounds of appeal had three grounds.

During the hearing of this appeal which proceeded by way of written submissions, Mr. Jacob Malick, learned counsel represented the appellant whilst the respondent appeared in person, unrepresented.

In his submission supporting the appeal, Mr. Malick decided to abandon six (6) grounds of appeal that appeared on the memorandum of appeal and decided to argue the additional grounds of appeal.

Submitting on the 7th grounds of appeal, Mr. Malick learned counsel averred that the 1st appellate court failed to properly evaluate the evidence submitted by the parties at the trial court. He argued that it was revealed at the trial court that the respondent was not at the scene of the crime thus his evidence has nothing to do with the appellant. He argued further that there was a contradiction regarding the date of the incident whereby PW1 said it was 21/06/2021, while PW2 said it was 27/06/2021 thus based on the said contradiction the case was not proved on the balance of probabilities. Further to that, the youth who were seen with the cattle were not joined as parties to the case which led to the nonjoinder of necessary parties. Lastly, he submitted that the appellant only decided to pay the respondent Tshs. 200,000/= out of compassion to keep peace between them as neighbours and the same could have not be the proof of the alleged claim.

Regarding the 8th ground of appeal, Mr. Malick submitted that having expunged exhibits P1 and P2 nothing remains to prove the case of the respondent. Thus, the 1st appellate court was supposed to quash the decision of the trial court.

Responding to the 7th and 8th grounds of appeal, the respondent conceded with the appellant that the 1st appellate magistrate erred in law by expunging the evidence from the record and dismissing the entire appeal with costs. He averred that the proper procedure was to allow the appeal to the extent of expunging the exhibits from the records and then dismissing the other grounds of appeal for lack of merit. It was his further submission that although P1 and P2 were expunged from the records the remaining evidence still proved the claim on the balance of probabilities. As for the issue of dates, it was his submission that the same does not go to the root of the case as it was just a clerical error which always happens in typing.

As for the 9th grounds of appeal, Mr. Malick submitted that no evidence was submitted to prove the claim of the respondent after exhibits P1 and P2 were expunged from the records. He added that there was no connection between the cattle and the destruction of the grass. Further, as the three (3) youths found with the cattle were not joined as

necessary parties to the case, there was a non-joinder of the parties. He prayed for the appeal to be allowed with costs.

Responding to this ground, the respondent stated that there is no dispute that after the incident the matter was reported to Village Executive Officer (VEO) and the appellant admitted to it and agreed to pay Tshs. 750,000/= and he already paid Tshs. 200,000 on the same day. He was of the view that why did he pay Tshs. 200,000/= if there is no claim between him and the appellant. She prayed for the appeal to be dismissed with costs.

In a brief rejoinder, Mr. Malick reiterated what has already been submitted in his submission in chief and maintained his position that a claim against the appellant was not proved on the balance of probabilities.

Having heard the submission from the counsel of the appellant and that of the respondent the issue for determination is whether the appeal has merit or not.

Before embarking on the determination of the appeal, it has to be noted that this is the 3rd appeal whereby it is a principle of our law that, a 3rd appellate court rarely interferes with the concurrent findings of two lower courts unless the findings are based on misdirection or

misapprehension of evidence. It can only interfere where there is a violation of a principle of law or procedure or when there is a miscarriage of justice. The same was held in the case of **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores vs A.H Jariwalla t/a Zanzibar Hotel** [1980] T.L.R 31 the Court of Appeal stated that: -

> "*Where there are two concurrent findings of facts by two Courts, the Court of Appeal, as a wise rule of practice should not disturb them unless it is clearly shown that, there has been a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure.*"

The above principle applies to the High Court when it determines the appeal which originated from the Primary court and there is a concurrent decision of the two lower courts. Having revisited the records, this court noted that in determining the appeal at the 1st appellate court, there was misapprehension of evidence. The records of the 1st appellate court shows that exhibit P1 and P2 which were the letter from the Village executive Officer and the pictures of animals were expunged from the records for being admitted contrary to the law.

Having expunged the alleged exhibits which were relied upon by the trial court to prove the claim against the appellant, nothing remains to prove that the appellant's cattle did destroy the grasses at the farm of the respondent which valued Tshs. 10,000,000/=. The records shows that SM1 who is the respondent herein gave hearsay evidence which is not admissible in law. See the case of **Vumi Liapenda Mushi vs Republic**, Criminal Appeal No. 327 of 2016, Court of Appeal, Arusha Registry(unreported) which is a criminal case but its principle applies to civil cases as well. Further to that, SM2 who was an eye witness stated that he saw cows and goats getting in the respondent's farm and started eating grasses. However, he did not state if the said cattle belong to the appellant herein.

It was the submission of the respondent that the appellant admitted those allegations at the village office and agreed to pay Tshs. 750,000/= and paid Tshs. 200,000/= on the material date. The appellant disputed the fact that he admitted the claims against him but he paid Tshs. 200,000/= for his own compassion and in order to maintain good neighbourhood. So long as this allegation was disputed, the respondent was duty bound to prove his allegation. Unfortunately, there is no any witness from the village office who was brought in court to prove that

the appellant herein admitted to pay the claimed amount. Thus, in the absence of the aforesaid evidence the claim against the appellant was not proved on the balance of probabilities.

It is settled that in civil cases the burden of proof lies to a party who alleges anything in his favour, (see **the case of Antony M. Masanga vs (1) Penina (Mama Mgesi) (2) Lucia (Mama Anna),** Civil Appeal No. 118 of 2014, CAT (unreported). In the case at hand, the respondent did not exercise his duty to prove his allegations to the required standard.

Thus, based on the reasons adduced herein, I allow this appeal for being meritorious. Accordingly, the decision of the two lower courts is hereby quashed and set aside. Due to the relationship of the parties, I give no order as to costs.

It is so ordered.

DATED at **ARUSHA** this 24th July 2023.

N.R. MWASEBA

JUDGE