

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

P.C. CIV. APPEAL NO. 21 OF 2007

*(Arising from Tarime D/Court Civil Appeal No. 34/2006
Originating from Tarime Primary Court Civil Case No.1/2006)*

MATUTU MKAMI..... APPELLANT

Versus

NASHON GESARABE GACHORI.....RESPONDENT

JUDGEMENT

26/5 & 5/6/2009

SUMARI, J

This is an appeal arose from the primary court of Tarime. Before the primary court the appellant successfully sued the respondent and two others namely, Chacha Yusufu and John Chacha who are not party to this appeal, for the recovery of eleven heads of cattle unlawfully seized from the appellant by the traditional General meeting commonly known as '**Ritongo**', under the leadership of Chacha Yusufu as a chairman and John Chacha as a secretary.

Briefly the facts of the case are that the respondent alleged that on 1/3/2005 the son of the appellant by the name Chacha Matutu @ Mkami stole from the respondent nine heads of cattle.

Upon reporting to the village leaders, the chairman and the secretary convened a general meeting, '**Ritongo**' and resorted on seizing the appellant's eleven heads of cattle, 9 been a refund of stolen ones and the 2 as compensation of the costs incurred in seizure exercise.

It follows therefore that appellant went to primary court to complain against the exercise. He thus successfully sued the two leaders including the respondent in the primary court which ordered the respondent and the two to pay back or return the said 11 heads of cattle to the appellant and to bear costs of the suit. Respondent was aggrieved by the decision so successfully appealed to the District court of Tarime. The district court of Tarime in overturning the trial court's decision held that, the trial court had no jurisdiction to decide the case against the respondent as the suit was not founded on customary law.

The appellant was dissatisfied and appealed to this court. In his grounds of appeal appellant is complaining that the district magistrate misdirected himself in law in his findings for relying on cases cited while the appellant's case is of a different nature, what is been claimed for recovery is heads of cattle owned by the appellant.

At the hearing that appellant contended that the respondent had no claim over him but unlawfully used a traditional tribunal to seize his property, the 11 heads of cattle. He called upon this court to order the respondent to return all of his cattle and costs of the case.

The respondent responded that it is not true that it was a traditional tribunal but it was a '**Ritongo**', meaning the whole village. And this was because the son of the appellant stole his cattle. Responding to this court's question respondent said, the appellant's son is about 35 to 40 years old and is married and has children and his own house/residence. Respondent further claimed that he did not personally accompanied the group which went to seize the heads of cattle to the appellant, neither to the appellant's son. According to him it is the villagers (**Ritongo**) who went and seized the heads of cattle and later he was handed over 11 heads of cattle and therefore not sure where the 11 heads of cattle seized. He however, contended that at the trial court he heard the chairman and the secretary saying that they seized the cattle from the appellant.

In addition he said, the 11 heads of cattle were handed over to him in writing and copies of the same were distributed to the District commissioner.

He finally contended that since the son of the appellant admitted to have stole from him, he decided to use the cattle and has sold them all.

Appellant in rejoinder said, all what he knows is that the 11 heads of cattle were seized from his Boma and were his property. The said son is a grown up person, an adult as well put by the respondent to this court. He is of the view that, the said son been an adult, the respondent ought to have reported him to police for theft and could be prosecuted. That his property which was unlawfully seized was the source of his earning and his family depended on it. It would be unfair and it is unfair for him to be punished on somebody else's acts. He bitterly complained, why didn't they arrest the said son of him and prosecute him. He re-iterated his prayer for his appeal to be allowed.

This is a straight forward matter. From the evidence which is not disputed by the respondent the eleven heads of cattle, the subject matter were seized from the appellant. The respondent therefore is not denying the claim. What respondent insisted is that since the appellant's son stole the respondent's cattle then it was right for him or the '**Ritongo**' to seize the appellant's cattle to compensate his stolen cattle. In his defence the respondent tried to

put it that the said cattle were the appellant's son property, one Chacha Matutu @ Mkami.

However, throughout the proceedings there is no evidence advanced in court to have proved that the said cattle were the appellant's son property. There is neither evidence advanced to prove that respondent had any legal claim against the appellant or his son Chacha Matutu @Mkami.

Careful reading of proceedings, however, discloses the facts forming criminal offence against the said Chacha Matutu@ Mkami and not of civil nature. If at all respondent had a proof of theft against the said son of the appellant he could report the matter to police and the matter be investigated and the law to take its course not to take the law in their hands and punish a person who committed no offence, in this case the appellant.

With the available evidence on the trial court's record and the findings of the trial, the District court in its appellate jurisdiction erred in law in holding that the trial court had no jurisdiction to try the suit as the suit was not founded on customary law. The District court magistrate misdirected himself on the facts of the case because careful reading of the whole proceedings reveals that the transaction which took place all along coupled with traditional belief governed with Kurya traditions i.e. the '**Ritongo**' where the decision of all

villagers, according to respondent's version, amounts to a legal and final decision. That it is the said '**Ritongo**' which justified the seizure of the appellant's cattle. However, as admitted by Chacha Yusufu, the chairman and John Chacha, the secretary, the whole transaction was unfair to the appellant. So, had the District magistrate properly directed his mind on the transaction he could not simply oust out the trial court's jurisdiction on the basis that the matter was not founded on customary laws.

The District court having consider the matter and found that asportation of goods took place, he then ought to have directed his mind on whether there was a legal action over the said asportation of goods or not. In so doing he would obviously found that the whole matter centered on criminal law and not civil matter and decided on those lines but not to vitiate the whole proceedings as he did.

Mere allegations of a crime as respondent did in this case, without supporting it by evidence cannot just let to stand. The respondent under the law (criminal) had to establish a case against the culprit who stole his cattle and not to resolve in a short cut way under the umbrella of '**Ritongo**', which its legality is expressly unknown under the law of the land.

It should be borne in mind that even if it is proved that the appellant's son indeed stole the respondent's cattle as alleged, in law

the appellant is not responsible with his son's crimes. As well put by the appellant, respondent ought to have dealt with the said son, he being grown up and an adult responsible with his own acts under the law.

The trial court found the appellant's claim proved and decided in his favour ordering the respondent and his companion to return the eleven heads of cattle to the appellant and costs of the suit. Which decision I think sounds fair on the part of the respondent since he does not deny to have been handled all eleven heads of cattle in writing. For the other two I will canvas their fate at the end of this judgement.

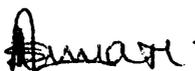
Having said that much I find that the District magistrate went completely off-tangent in determining the respondent's appeal against the primary court's decision. In his judgement the appellate District magistrate confined himself to the issue whether the suit was founded on customary law.

He thus resolved that since the matter was not founded on customary law the trial court had no jurisdiction to try it and thus nullified whole trial court's proceedings and the judgement. In my opinion this decision was bad in law because it based on an issue which was not before the trial court. I'm very mindful that issue of jurisdiction can be raised at any time of proceedings, even at a stage

of appeal, but as I have endeavoured to show above, the reasons given to vitiate and nullify the whole proceedings were out of absolute misdirection in law.

It follows therefore, that the district court's decision is defaulted and set aside. The trial court's decision is restored but slightly disturbed as follows:- That the order to return the eleven heads of cattle is solemnly directed to the respondent, that is to say, the respondent is hereby ordered to return to the appellant eleven heads of cattle or cash money equivalent to the said number of cattle, whichever. This should be done immediately, failure of which attachment to take place.

The appellant's appeal therefore is allowed with costs, here and in the lower courts.


A.N.M.-SUMARI,
Judge

Delivered in presence of both parties.

AT MWANZA

05/06/2009