IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

PC CIVIL APPEAL NO. 12 OF 2021

TOTI WAMBURA ..... APPELLANT

VERSUS

ELVA SADY ..... RESPONDENT

(Appeal from the judgment of the District Court of Tarime at Tarime in Civil Appeal No. 38 of 2020)

JUDGMENT

10th and 24th August, 2021

KISANYA, J.:

This is a second appeal. It originates from the decision of the Shirati Primary Court wherein, the respondent, Elva Sady instituted a suit against the appellant, Toti Wambura claiming for payment of TZS 603,000 as compensation arising from the damages caused by the latter's pigs which destroyed her farm. The trial court entered judgment in favour Elva Sady.

Toti Wambura, however, was aggrieved by that decision. Thus, he appealed to the District Court of Tarime. His appeal was, among others, based on the ground that, the compensation for the damages

was not proved for want of a valuation report by the agricultural officer and evidence that his pigs caused the damages in the respondent's farm. After the hearing, the first appellate court upheld the trial court's findings. It went on to dismiss the appeal for want of merit.

Still dissatisfied, Toti Wambura has brought this appeal to this Court on four grounds which essential hinge on these two complaints:-

1. *The 1st appellate court failed to evaluate the evidence and arrive at its own findings.*
2. *The 1st appellate court failed to ascertain the basis of compensation of TZS 603,000.*

At the hearing this appeal, both parties appeared in persons, unrepresented.

Submitting in support of the appeal, the appellant argued that the respondent did not prove that her farm was destroyed by his pigs. The appellant went on to submit the respondent did not prove her claim for compensation. His submission was based on the reasons that, he was not involved when the agricultural officer valuated the destroyed crops; the said agricultural officer was not called to testify on the matter; and the valuation report was not tendered in evidence. That said, the

appellant asked the Court to allow the appeal by quashing and setting aside the decision of the lower courts.

In response, the respondent submitted that she proved that her farm was destroyed by the appellant's pigs which ran into the booth at the appellant's house. On the second ground, the respondent submitted that the appellant defaulted to appear during the valuation of the destroyed crops. She admitted that the agricultural officer who valued the destroyed crops was not called to testify. However, she contended to have tendered the valuation report which proved the extent of the damage caused by the appellant's pigs. Therefore, the respondent was of the firm view that her case was proved on the required standard. Eventually, she implored the Court to dismiss the appeal with costs.

Rejoining, the appellant reiterated his submission that the respondent case was not proved because the agricultural officer was not called to testify.

In the light of the submissions by the parties, this Court is called upon to determine whether the respondent proved her claims on the required standard. This issue is premised on the provisions of reg. 6 of the Magistrates' Courts (Rules of Evidence in Primary Courts)

Regulations, GN No. 22 of 1964, which require the primary court to decide the case in favour of a party whose weight of the evidence is greater than the weight of the evidence of the other party.

In the instant case, the respondent was essentially required to establish that his farm were destroyed by the appellant's pigs thereby causing to damages of TZS 603,000/= claimed as compensation. The trial court and first appellate court were of the concurrent findings that the respondent had proved her case. This being a second appeal, the Court cannot interfere with the concurrent findings of the lower courts unless it is established that, there was a misapprehension of evidence leading to a miscarriage of justice or violation of principle of law or procedure. There is a plethora of authorities on that position, one of them being the case of **Fatuma Ally vs Ally Shabani**, Civil Appeal No. 103 of 2009 (unreported), in which the Court of Appeal held:-

> *"Where there are concurrent findings of fact 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. In other words, concurrent findings of facts*

by lower Courts should not be interfered with except under certain circumstances."

The complaints raised in the appeal at hand are to the effect that there was a misapprehension of evidence or violation of some principle of law or procedure by the trial court and first appellate court. Therefore, I was inclined to revisit the evidence on record with a view to satisfy myself on the appellant's complaints.

In her complaint filed before the trial court, the respondent averred that her farm was destroyed by the appellant's pigs on 5/06/2020 and that he suffered the damage of TZS 603,000/=. However, her evidence shows it is the hamlet chairperson who saw the appellant's pigs destroying her farm the date (05/06/2020) stated in the complaint. On his part, the hamlet chairperson who testified as PW2 told the trial court that he found one pig with black dots in the appellant's farm on 5/06/2020 and that the said pig entered in the booth at the appellant's house. However, evidence adduced by PW2 shows that the pig which destroyed the respondent's farm was white in colour and that the appellant's had no booth for his pigs.

In that regard, I am of the considered view that the evidence adduced before the trial court was not sufficient to prove that the pig which destroyed the respondent's farm on 05/06/2020 belonged to the appellant.

Even if it assumed that the pig belonged to the appellant, the issue for consideration is whether the respondent proved the extent of damages claimed in this case. Again, the lower courts were satisfied that the claimed damages were proved by the valuation report signed by the agricultural officer. Upon reviewing the record, I have noted that the valuation report relied upon by the lower courts was not tendered in evidence. Further to that, the agricultural officer was not called to testify on the matter. Although the respondent appended the valuation report to his letter addressed to the primary court at the time of instituting the case, she was required to produce it during the trial. This requirement is provided for under reg. 8(1) of the Magistrate Courts (Rules of Evidence in the Primary) Regulations (supra), which reads:

"8.-(1) *Facts are proved by evidence which may be:*

(a) N/A;

(b) the production of documents by witnesses (documentary evidence);

(c) the production of some other thing relevant to the case (real evidence), e.g. a rungu with which an assault is committed."

Now that the valuation report was not tendered in evidence, the trial court and first appellate court erred in taking into account a fact which was not proved in the case. In so doing, reg. 7 of the Magistrate Courts (Rules of Evidence in the Primary) Regulations (supra) which requires the court to confine itself to facts proved in the case was complied with. The said regulation is reproduced hereunder:

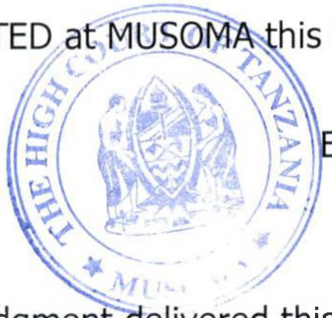
> *In deciding all cases, the court must confine itself to the facts which are proved in the case .... A court must not take into account any fact relating to the case which it hears of out of court except facts learnt in the presence of the parties during a proper visit to any land or property concerned in the case.*

Therefore, in the absence of the valuation report by the agricultural officer, there is no evidence which proved the damages and thus compensation claimed by the respondent. This is so when it is considered that the said agricultural officer was not called to testify and his whereabouts not stated.

For the foresaid reasons, I find that the respondent did not prove his case. There was a misapprehension of evidence and violation of principle of law or procedure by the lower courts which led to miscarriage of justice.

In view thereof, the appeal is found meritorious and allowed. Thus, the judgments, decree and orders of the Shirati Primary Court in Civil Case No. 93 of 2020 and District Court of Tarime in Civil Appeal No. 38 of 2020 are hereby quashed and set aside. Upon considering the circumstances of this case, I make no order as to costs.

DATED at MUSOMA this 24th day of August, 2021.



E. S. Kisanya
JUDGE

Court: Judgment delivered this 24th day of August, 2021 in the presence of the parties. B/C Gidion present.

Right of appeal is well explained.

E.S. Kisanya.
JUDGE
24/08/2021