

TANZANIA / JUDGMENT

19760805 TZHC Arusha

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IN THE HIGH COURT OF TANZANIA I. La. J. m. DT I ELJJ! (PC) CIVIL APPEAL NO. 16 OF 1973 (FROM: THE DECISION of THE DISTRICT COURT of LRUS1-11 AT ARUSIA III CIVIL PP.EAL M. 54 OF 1973) LD3OIYESLIUI'TI,..... APPELLANT versus KISIOICI SL.RUNI •...• RESPONDENT TTTT,!T tJ UI) .T.1Ljl,j. JOILTHJd' J. In the Primary Court KISIOICI SARUICI sued his half brother, LrBOIYE SL.RTJPI for four head of cattle • The trial magistrate in a minority decision found for the Plaintiff. The two assessors sitting with him, on the other hand, gave judgment for the defendant and in effect that became the judgment of the court. KISIOICI successfully appealed to the District Court, hence the present appeal brought by ROTYE. SIRUICI, the father of the parties is dead but the date of his death is not indicated. They belong to the Meru tribe - IOIYE is older than KISIO. According to the latter in his evidence, some years ago he exchanged his sheep for a calf from one OIOLE, of the Lnsa tribe. There was then a cattle epidemic and he did not take the calf just then; he left it with TO'IOINE. It was later stolen by the son of OKOINE who has since died. It was, however, agreed that TOKOINE should pay a customary fine amounting to four head of cattle. It would appear that all those negotiations had been concluded by SARUICI on his behalf. For reasons which are not apparent, however, these animals were not paid at once • So, sometime later IOIYE is the primary court of Kibong'oto, Llosii District (as it was then) sued TOKOINE for the four head of cattle. Their father then effectively intervened saying that the matter was not the concern of IOIYE. IOIYE would not stop there and at a later date he again sued TOKOINE before the Primary Court for the same reasons. Tairajee again intervened. LOIYE, for the third time, after death of their father, again sued TOKOINE for the same reasons, this time in the Primary Court of Kinung'ori which, like that of Ibugumi, is in the district of Arusha. KISIOICI intervened ineffectually and the cattle were handed over to JOIYE. Rather surprisingly, this account was fully supported by ILTILYA, IOIYE's own mother. In particular, she said KISIOICI sold a sheep to buy a calf which he kept with TOKOINE. To a question by her son she however admitted that IOIYE had once driven his cattle to the cattle boma of TOKOINE where they stayed over-night before her father drove them back. She added that no animal was left behind. OROBI the son of TILOIJ was the last witness for the plaintiff if I shall say so. • • • • • -2 - He said his father ILTILYA had decided to exchange a calf for a sheep and, in consequence, he himself accompanied by KISIOICI brother, V~ -Lung Shoop to their house. The calf was given in exchange for a sheep. IOIYE then left TOKOINE for Gil: C. 1 but ill OI i i j 1 a i v o j i j . . . LB.CIYE then immediately sued his father before the Kibonoto Primary Court • no later restarted the case at Ibugumi. It was at that stage that his calf was stolen by the brother of his; hence He does not say

what the outcome of the case was, but he does not say that, after the death of their father J;hQIYE claimed 4 head of cattle from TIKOINE. Those, he said, should have gone to KISIOKI. So as for the plaintiff's case • The defendant in his testimony said in 1955 he received his whole herd to the cattle boss of TIKOINI. On the next day, however, his father took them back but he left one behind in error and he, the defendant, asked TIKOINI to keep it for him. He kept it until 1960 when it was stolen. That resulted in the arrest of TIKOINI 171 -j as it occurred before the Primary Court of Kibung'oto. That court lacked jurisdiction and the defendant on its advice sued TIKOINE in the Provincial Court of Itighini where TIKOINE agreed to pay him four head of cattle within five days. But TIKOINE soon reneged, presumably to deny his claim with a view to the 10th of March, 1973 when he sued him in this court in the Primary Court of Itighini. The defendant alleged that TIKOINE was not withstanding protests by KISIOKI as the true account was supported by 'UHC evidence of one NPKIIZE. He said the defendant had brought a herd of cattle ... to him. But of TIKOINE's only testimony was that he had been on the next day by the witness, notwithstanding the loss of one oxen, and the subsequent claim by the defendant. One witness also testified for the defendant. Like TIKOINE, the witness is of the Itighini tribe and at the relevant times he was representing the defendant on the council of the Native Itighini. He rebuffed the defendant accusing TIKOINE of having received the cattle from the Primary Court and the case then being transferred to Itighini. Before the former, he said, he heard the witness say this; he had lost one oxen, and he supported the claim of his son. The witness TIKOINE was asked to pay five, and not four, oxen, this within five days. At a later date he gave up the case of TIKOINE. The witness, before which he successfully gave his statement, in his brief, it was stated: in his statement of facts from him. It was not true, therefore, he said, that the failure of TIKOINE to pay as had been ordered was not due to his subsequently moving out of that area as testified by the defendant. The case is one of considerable difficulty and it is not surprising the lower courts have arrived at different conclusions. TIKOINE, had he been called would have been very helpful in the matter. Unfortunately, however, when the proceedings were brought he was too old to appear and the parties did not book to call him. The trial magistrate in his dissenting decision sought to hold it against the defendant largely because, contrary to his claim, there had not been a case filed in the Primary Court of Monfimi to which the defendant and TIKOINE were the parties. -3-. In the record there is a letter by the magistrate of the Itighini Primary Court in which he certifies that the register of that court does not show any case having been filed between 1960 and 1970 in which the defendant and TIKOINE were the contestants. No such proceedings may have been filed there but, as conceded by the plaintiff and his witness OROBI in their evidence, there was considerable dispute at Mbuguni between these two people which may have been settled administratively. It may be noted that the majority of our Primary Courts especially those in the rural areas are juxtaposed with the offices of the administration. A large section of the public therefore, often makes no distinction between the judicial and administrative or executive organs in those areas • In the present case there was undoubtedly a dispute lodged at Mbuguni involving the defendant and TIKOINE which may have been dealt with by the Divisional or District offices. Accordingly the letter that no such dispute had been filed in the primary court was largely irrelevant to the real issue before the trial court, namely, as I have said, because there was agreement that such dispute had been reported at Mbuguni. The main reason for the first

appellate court allowing the appeal before it was, as it found, an apparent lack of evidence that the defendant had been given the cattle by order of any court. I think this was a misdirection. Both the plaintiff and the defendant in their evidence agreed that there had been proceedings before the Kingori Primary Court in which it was ordered that those animals should be handed over to the defendant. In those proceedings the plaintiff had unsuccessfully objected to that course. Of course that court does not appear to have fully investigated the merits of the plaintiff's *deja vis-a-vis* those of the defendant, but it was not true that the animals had not been given to the defendant on any order of a court. No reason has been forthcoming for the long delay there was in getting TIKOINE to pay up. The plaintiff has no idea of dates and he and his witnesses make no reference whatever to the dates of the various stages in the case. It however, seems to date back to a great number of years ago. The defendant has been more helpful in this regard. Now, if, as he says, his one load of cattle bit with TIKOINE was stolen from him in 1960, there is no apparent reason why should have taken more than 10 years to get TIKOINE to pay up. TIKOINE may have moved out of that area thereby causing some delay as he says, but that happened after the Mbuguni meeting. As to this indication is however, it was held after 1970. The delay as regards the preceding period is not covered by that explanation. But this cannot be blamed on the defendant alone; equally, the plaintiff, and his father do not appear to have zealously followed up their claim. The defendant, notwithstanding such snortcoming, appears all along to have been actively involved in the move to get TIKOINE to pay the animals, albeit there may have been a dispute between himself and his father as to which of them was entitled to payment. I have in mind the appearances at Kibong'oto, Mbuguni and King'ori. At all those meetings he appeared to be the claimant against TIKOINE and SARUNI was little more than an interested intervener or objector.

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- 4 - I get the impression that SARUNI would not himself take any appreciable initiative to get those animals. I would accordingly agree with the trial assessors that the apparent laxity or even indifference on the part of SARUNI considerably vitiated such claim as he might himself ultimately have made against the defendant. The position of the plaintiff vis-a-vis that of the defendant is not any better than that of their father. He was an adult when any cause of action accrued against TIKOINE. At no stage, however, has he personally made any claim against TIKOINE for those animals; the most he appears to have done, if at all, is to accompany his father to confront either TIKOINE or the defendant. It has however been explained, that he could not have made any claim as long as his father lived. It is doubtful if that is a customary rule among the Weri. Be that as it may, the assessors do not seem to have been so impressed. One or two considerations seem to detract somewhat from the case for the defendant. There is, as already pointed out, some conflict between his evidence and that of his witness JYA firstly, as regards the Mbuguni meeting awarded him and secondly, respecting the reason for the delay in following up that award. There is then the evidence of his own mother supporting the plaintiff's case. Ordinarily, it takes a lot of courage for a mother to testify falsely against her own son's interests, but from the defendant's statement before she gave her evidence and from the proceedings as a whole I got the impression that relations between the defendant and his relatives, including his

parents, had been estranged for a long time. Her evidence should therefore be seen in this light. As I indicated earlier this is not one of those cases where one can decide completely with a clear mind. It depends entirely on credibility, in respect of which the trial court was the best judge, it having seen and heard the witnesses. In the event, it found for the defendant, if only by a majority decision. Would the two courts above it be entitled to upset that decision? I think not, notwithstanding that the case for the defendant is to some extent self-contradictory. The case was to be decided on the balance of probabilities, and the plaintiff in order to succeed had not merely to strike a balance; he had to go further, if just, to upset that balance in his favour. In the circumstances of the case, I cannot say that the assessors were wrong when they found he had not discharged the burden that lay on him to establish. In the result the appeal is allowed with costs. The judgment of the District Court is set aside and in its place there is restored that of the trial court. (P. K. JOILTHJd-T) JTJDG. Judgment delivered in open court at Arusha this 5th day of August, 1976. O. (P. K. JONATHAN) PMJ/MTPI. JUDG-E on -s..

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