

TANZANIA / JUDGMENT

20140603 TZHC Moshi

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li ,...!.. · 1)' .. IN THE HIGH COURT OF TANZANIA · I AT MOSHI CIVIL APPEAL NO 13 OF 2010 C/F
CIVIL CASE NO 11 OF 2008 DISTRICT COURT OF SAME AT SAME. TOTO
KASI 1ST APPELLANT SAME DISTRICT
COUNCIL 2ND APPELLANT VERSUS ZAWADI G.
MUGHAMBA RESPONDENT

JUDGEMENT

Date of Last Order 28/04/2014 Date of Judgement 03/06/2014 NYERERE, J The appellants herein above are appealing against the decision of Same District Court which decided in favour of the respondent. In their memorandum of appeal they advanced five grounds as herein under;

1. That the trial court erred in law and facts for granting punitive damage without justifiable reasons.
2. That the trial court erred in law and facts for deciding that the respondent had a permit allowing him to harvest forest produce while he had none.
3. That the trial court erred in law for concentrating on relief claimed instead of dealing with the issues relevant to the cause of action. 1 I
4. That the trial/ court misdirected itself in holding that the ' I respondent was forced to pay a fine of T. Shs 500,000/= to the ,. , ' second appellant. I
5. That the court erred in holding that the respondent is the lawful I I owner of 125J pieces of timber while they were confiscated by . I the appellant as a penalty for harvesting forest produce ; ' without perm.it. I The hearing of !the appeal proceeded orally in absence of the ' I second appellant; the first appellant appeared in person and the respondent was represented by Mrs. Kamanzi learned advocate. I Arguing the appeal the first appellant submitted that he was ordered to pay damages by the District Court to pay what he was ' I allowed to do as a District Officer of Same by then. He was discharging his duties on behalf of the District Council of Same. Thus I the trial court erred because there was another officer like James ' Mshale who was in charge and he ordered him to release a I motor vehicle to go and collect the confiscated pieces of timbers. ' The first appellant argued in ground two that it is true that the respondent had no permit which allowed him to harvest

forest ; produce. The respondent had no license and what was shown in court were local receipts from village executive officer of Mtunguja village. And on ground three the first appellant submitted that the trial magistrate dealt with one type of tree only called Giravillea ; Robusto but left the trees which were found with the respondent. ' They did not see any reason why the trial magistrate admitted those 1257 pieces of timbers from the natural trees which the respondent was found in possession. 1 The first appellant submitted on ground four that the respondent was not forced when he signed on condition as per section 85 of the Forestry Act. Those forestry officers are empowered to exercise their discretion to order a suspect to pay fine. Under section 95 of the same Act the court is empowered to order both fine and imprisonment. The trial court contravened section 6(6) of the Forestry Act since the first appellant was empowered by that section to do whatever he ordered in this case. 1 The first appellant added that it was not proper to hold that the respondent was a lawful owner of 1257 pieces of timbers. They were right when they confiscated them and ordered him to pay T. Shs 500,000/=. Lastly the first appellant prayed this court to allow the appeal with costs. 1 Mrs. Kamanzi learned counsel for the respondent in reply submitted on ground one and two that the trial court lawfully ordered the first appellant to pay the punitive damages because the acts of the defendants were actuated by malice and the malice is that the trees in question were not subject to Forestry Act, they were trees planted by the respondent and in order to cut them he needed a permit from the village council of Mtunguja. The respondent applied for the permit and, it was issued to him on 18/9/2007. Such permit allowed the respondent to cut any type of tree he planted irrespective of whether they fall to the indigenous trees or not. The respondent had a permit not a license as per the reasons stated, he was harvesting trees in his farm not forestry products. Submitting on the third ground of appeal the learned counsel for the respondent stated that it is not true that the trial court concentrated on the relief claimed instead of dealing with issues relevant to the cause of action. The court resolved each issue and concluded with relief prayed. And on ground four the counsel for the respondent submitted that the trial court did not misdirect itself, the respondent did pay and there is an exchequer receipt to that effect and the court rightly decided the money to be paid back to the respondent because Section 95 of the Forestry Act deals with the offences committed under the Act. The respondent in this case did cut his personal trees which do not fall under the Act. Therefore the fine under section 95 does not apply in the event. Responding to ground five the counsel for the respondent submitted that they maintain that the pieces of timber they are referring to are not forest produce, they are the personal properties of the respondent and thus the confiscation was illegal. Lastly the counsel for the respondent prayed this court to dismiss the appeal. Having gone through the memorandum of appeal, the record of the lower court and the arguments advanced for and against by both parties I will deal with the grounds of appeal as follows; I will start with the second ground of appeal where the appellants stated that the trial magistrate erred in law and fact for deciding that the respondent had a permit allowing him to harvest forest produce while he had none. It is not disputed that the respondent harvested the trees (Giravillea) which were planted in their farm. And he applied for the permit to the village of Changile

Mtunguja to cut down his trees and was granted the same on 18/09/2007. The respondent then went on to cut the trees in order to finish building his school. Before he could transport the trees to his school, they were seized by the appellants for the reason that he cut the trees without authorization from the District Council. Following that the pieces of timber were confiscated by the appellants and the respondent was condemned to pay fine of T. Shs. 500,000. The first appellant was of the view that the respondent had no license/permit which allowed him to harvest the said trees and what was shown in court was just a receipt from the village executive officer of Mtunguja village. While the counsel for the respondent stated that the trees in question were not subject to Forestry Act, they were trees planted by the respondent and in order to cut them he needed a permit from the village council of Mtunguja. The respondent applied for the permit and it was issued to him on 18/9/2007. I fully agree with the learned counsel for the respondent that the respondent had a permit to harvest his trees from the village Council of Mtunguja as evidenced by the letter of reply from the chairperson of Mtunguja village (exhibit "PS") and the receipt of payment of T. Shs. 50,000 issued by the village (exhibit "P6"). Such exhibits are sufficient enough to show that the respondent had a permit to harvest the trees he applied for in the village council of Mtunguja. As well I had to go through exhibit "D3" titled "MWONGOZO WA UVUNAJI ENDELEVU NA BIASHARA YA MAZAO YA MISITU". In preface paragraph (i) provides that; "Mwongozo huu unptokana na sera ya Taifa ya Misitu ya mwaka 1998 na sheria ya Misitu Namba 14 ya mwaka 2002, Pamoja na Matamngazo ya Serikali (Government Notices) namba 69 na 70 ya mwaka 2006" And also under paragraph (v), it is also stated that; "Ki/a atakayetaka kuvuna mazao ya misitu atatakiwa kupata barua yenye idhini ya serikali ya kijiji husika" That being the case it was proper for the respondent to apply for a permit to harvest his trees in the Village council since he harvested his trees from their forest and the same does not fall under the District Council as per exhibit "D3" in one of the phrases which provides that individual forests does not fall under the District Harvesting Committee. Therefore the trial court was justified to rule out that the respondent had a permit from the village council of Mtunguja to harvest the forest produce from his own farm. Now dealing with the third issue concerning the fine paid by the respondent to the second appellant. The same was paid by the respondent on 3/10/2008 as evidenced by exhibit "P9" an exchequer receipt issued by the second defendant and an agreement to pay compensation filled by the respondent himself (exhibit P8"). In such an agreement the respondent agreed to pay the fine and admitted to have contravened the Forest Act no 14 of

2002. Having gone through the available evidence on record I am satisfied that the respondent was not forced to pay the compensation as alleged. The respondent signed the agreement form and there were witnesses to it. That proved that he did it on his own free will. But since the respondent had a permit to harvest the trees then the fine paid is illegal. The appellants said the respondent contravened section 85 and 95 of the Forest Act No. 14 of 2002. I wish to quote the provisions of section 85 and 95 as follows: "Section 85. Any person who without a licence, permit or other lawful authority under this Act fells, cuts, lops damages, removes or sells any reserved tree or any part thereof on unreserved land

shall be guilty of an offence and upon conviction shall be liable to a fine of not less than fifty thousand shillings and not exceeding one million shillings or to imprisonment for a period not exceeding one year or to both such fine and imprisonment." "Section. 95. The Director or any officer specifically authorised by the Director by notice published in the Gazette may, subject to and in accordance with the provisions of this section, if he is satisfied that a person has committed an offence against this Act, compound such offence by accepting from such person a sum of money together with the forest produce, if any, in respect of which the offence has been committed." The provision of section 85 is very clear that the offence as described is supposed to be compounded by the Court. The District Council or its Officer has no mandate to act under the provisions of section 85. As well under section 95 the Director or any Officer authorised by the Director by notice published in the Gazette is authorised to compound an offence in a manner described therein. There is no proof that the first appellant met the qualifications stated in the provision of, section 95. Therefore the fine paid to the defendants is illegal the same should be refunded to the respondent. Therefore it was indeed justifiable for the trial court to order that the 1257 pieces of timber are legally owned by the respondent. As regard to the punitive damages ordered to be paid by both defendants. The trial magistrate explained in his decision that the acts by the defendants/appellants were actuated by malice. It is my considered view that the same was not proved at all, there is no concrete evidence produced by the respondent to prove that the acts of confiscating the respondent's pieces of timber was done purposely. All the acts done by the appellants were done so in course of their duties and if the same was done by mistake as it is in this case, thus there is no justifiable reason to award punitive damages. As the first appellant was performing his duties as an Officer of the Same District Council his employer. That being the case he can not be condemned to pay what ever is awarded to the respondent. The same should be paid by the employer i.e. the second defendant. For the reasons stated herein above, this appeal is partly allowed for the reason that the punitive damages was wrongly awarded to the respondent. It is also dismissed and the respondent be refunded T.Shs. 500,000/=, and the general damages T. Shs. 1,500,000/= be paid by the second defendant to the respondent. 8 . Order accordingly. A.C. NYERERE JUDGE 03/06/2014 Judgment delivered this 3rd day of June, 2014 in the absence of Both appellants and in the presence of Mr. Daniel Oleikayo learned Counsel for Respondent and respondent present. A.C. NYERERE JUDGE 03/06/2014 I hereby certify this to be a true copy of the original. H. . MUSHI DISTRICT REGISTRAR 03/06/2014 9

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