



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL APPEAL NO. 22 OF 2018

(FORMERLY MACHAKOS HCCA NO. 249 OF 2014)

SIMON SUNKUYIA SHIRA.....APPELLANT

VERSUS

KILONZO NGANGA KINILA.....RESPONDENT

(Appeal from Judgment and Decree of (Hon. M. O. Okuche (PM) dated 30th day of October 2014

in Civil Case No. 269 of 2005 at Principal Magistrate's Court, Kajiado)

JUDGMENT

1. This appeal arises from the Judgment and Decree of **Okuche (PM)**, dated 30th October 2014. In that Judgment, the trial court awarded the respondent Kshs. 112,076/= damages against the appellant for destruction of his crops by the appellant's livestock. The respondent was also awarded costs of the suit and interest.

2. The appellant was aggrieved with that judgment and decree and filed a memorandum of appeal dated and filed on 26th November, 2014 and raised the following grounds, namely:

1. That the Honourable Learned Trial Magistrate erred in law and in fact in disregarding the Appellants Submissions and applying the wrong principles of law, particularly both on the legal principles of "Vicarious liability" and "Preponderous of probability".

2. That the Honourable Learned Trial Magistrate erred in law and in fact by failing and/or in the manner in which he considered the evidence laid before him to wit that:

(a) The respondent was he legal owner to a parcel of land simply known as Parcel No. 236 within the Imaroro Group Ranch.

(b) The Respondent was a farmer on the aforesaid land.

(c) The Appellant was the owner to some 55 herds of cattle which bore mark "SSS" or any mark at all as no such evidence was produced in court.

Submissions

3. This appeal was disposed of by way of written submissions and oral highlights. During the hearing of the appeal, Miss Njoki, learned counsel for the appellant submitted highlighting their written submissions dated 11th December 2019 and filed on 13th December 2019 that the trial court did not consider the evidence on record in making its decision. According to counsel, the suit before the trial court arose from an alleged trespass and destruction of the respondent's crops by the appellant's livestock. Counsel relied on their written submissions and urged the court to allow the appeal.

4. In the written submissions, it was argued that there was no evidence that the appellant's livestock destroyed the respondent's crop and that the appellant was acquitted in Criminal Case No. 27 of 2005 that had been lodged against him. According to the appellant, he was erroneously found liable for the alleged damage to crops and that there was no evidence to prove that his livestock trespassed and damaged

the respondent's crops. The appellant further blamed the trial court for concluding that since the animals were branded "SSS" and his name is **Simon Sunkuiya Shira**, the livestock must have belonged to him, thereby deciding the case based on assumptions.

5. The appellant argued that the photographs produced before the trial court did not establish that the livestock belonged to him; that they were grazing on the respondent's land or where they were taken. In the appellant's view, actual trespass and destruction of crops was not proved on a balance of probabilities.

6. On liability, it was submitted that the trial court erred in holding the appellant vicariously liable for the actions of the second defendant in that case when there was no proof of employee-employer or master-servant relationship. The appellant argued that he was charged with other persons said to have been his herdsmen but he was acquitted. In his view, those people should have been sued individually since they were not his herdsmen. He also argued that vicarious liability was not proved. He relied on the decision in **Anyanzwa & 2 others v Lugi De Casper & another** [1981] KLR 10 for the submission that vicarious liability was not on ownership but on the delegation of authority or duty.

7. He also relied on **Kaburi Okelo & Partners v Stella Karimi Kobia & 2 others** [2012] eKLR for submission that vicarious liability arises when the tortious act is done in the scope of or during the course of one's employment or authority.

8. The appellant further faulted the trial court for holding that it was not necessary to prove ownership of land in order to establish destruction of crops. According to the appellant, proof of land ownership was critical since the land on which the respondent claimed his crops were was public liability land and could not have crops. He argued that it is from the ownership of land that other rights flow. He relied on **Stephen Mutia Ngulungu v Ngutho Muyalo** [2015] eKLR for the submission that the issue of food crops cannot be separated from that of ownership of land. The appellant again argued that damage to crops was not proved and relied on **Ronal M. Kamuti V Musembi Muasya** [2016] eKLR.

9. Mr. Musyoka, learned counsel for the respondent, opposed this appeal. He submitted, also highlighting their written submissions dated 3rd February 2020 and filed on 4th February 2020, that the trial court considered the evidence and arrived at the correct decision. Counsel relied on their written submissions and urged the court to dismiss the appeal.

10. In the written submissions, it was argued that ownership of parcel No. 236, a subdivision of Kajiado/Kaputiei Central/5, was proved and that the respondent was the owner. It was further argued that the respondent's claim was not based on damage to land but crops. Reliance was placed on **Stephen Munge Kentela v David Leshoo Kenteria & 3 others** [2011] eKLR

11. On proof of ownership of cattle, it was submitted that employees led the police to the appellant's home and that they had been arrested at the respondent's watering point. It was further submitted that the respondent proved his case on a balance of probabilities. Reliance was again placed on **Peter Kanithi Kimunya v Aden Guyo Haro** [2014] eKLR and **Anne Wambui Nderitu v Jospeh Kiprono Ropkoi & another** [2014] eKLR for the submission that he who alleges must prove.

12. On whether the appellant was the owner of the cattle, branded "SSS", the respondent argued that the onus was on the appellant to prove that the brand "SSS" did not belong to him but someone else. The respondent also submitted that the photographs were taken at the appellant's home where the cattle were found. He contended that witnesses testified that the cattle belonged to the appellant.

13. According to the respondent, he proved that the livestock belonged to the appellant and therefore he was vicariously liable. He relied on **Joel Mutemi Kivangu v Saiko Lekeressie & another** [2012] eKLR and **Paul Muthui Mwavu V Whitestone (K). Ltd** [2015] eKLR.

14. And on whether there was trespass, the respondent submitted that he had proved trespass and in his view, the appellant had the duty to prove otherwise which he did not. He relied on **Joseph Kipchirchir Koech v Philip Cheruiyot Sang** [2018] eKLR.

Determination

15. I have considered this appeal, submissions by counsel for the parties and the authorities relied on. I have also perused the trial court's record and the impugned judgment. This being a first appeal, it is by way of a retrial. This court is entitled to re-evaluate the evidence afresh and come to its own conclusion on that evidence. It must however bear in mind that it did not see witnesses testify and give due allowance for that.

16. In **Selle and another v Associated Motor Boat Company Limited and others** [1968] EA 123, the East African Court of Appeal held that:

"An appeal from the High Court is by way of a retrial and the Court of Appeal is not bound to follow the trial judge's findings of fact if it appear either that he failed to take into account particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally."

17. In **Williamson Diamonds Ltd and another v Brown** [1970] EA 1, the same court held that:

"The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion."

18. And in **Nkuba v Nyamiro** [1983] KLR 403 the Court of Appeal held that:

"A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a

misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

19. **PW1 Kilonzo Nganga Kinila**, the respondent, testified that he grows food crops on his land parcel No. 236, and produced documents, including a receipt from Mashuru Group Ranch for survey, receipt payment for sub-division, receipt & Surveyor’s certificate and a receipt for plot allocation as exhibits. He produced photographs as evidence of the fact that he grew food crops.

20. He told the court that on 9th January 2015, the appellant’s livestock grazed on his land and destroyed his crops; that the livestock were identified because they were branded “SSS” which were the appellant’s initials. The cattle were photographed by his son, now deceased and he produced the photographs as PEX 4. They reported the matter to the police leading to the appellant’s arrest and prosecution the appellant was however acquitted.

21. According to the respondent, he also reported the matter to the D.O who called a meeting and the appellant was asked to get the cattle away but he refused. He produced the minutes taken in that meeting as PEX 5. He further told the court that another meeting was held later and attended by the D.C and again produced the minutes of the meeting as PEX 6. He testified that cattle to his land about 12 times and because of that he did not harvest anything. He therefore filed the case seeking damages.

22. In cross-examination, the witness told the court he had a certificate to show that he was a member of Mashuru Group Ranch but he did not have a title deed to the land. He stated that the appellant was not one of the people who grazed on his crops. According to the witness, the cattle trespassed on 9th January, 2005 but he could not remember the other dates. He also stated that he could not tell the acreage he had cultivated and that the cattle belonged to the appellant as they had the mark “SSS”; that his late son Kennedy was the one who photographed the cattle and that the mark “SSS” belongs to the appellant. He further told the court that the damage caused was Kshs. 449,000. He also admitted that he had not pleaded vicarious liability.

23. **PW2 Luke Parmuat Muteti**, a neighbour to the respondent testified that cattle trespassed on to the respondent’s land in 2005 and according to this witness, the cattle belonged to the appellant since they were branded “SSS”. It was his evidence that it was the respondent’s deceased son who told him about the incident when he went to hire his car to go and report the matter to the police at Mashuru police post. They went to see the destroyed crop with the police and crop officer.

24. In cross-examination, the witness told the court that the respondent told him that his crops had been destroyed on 9th January, 2005; that the respondent had cultivated 12 acres but he never saw the cattle graze on the crops. He also testified that the photographs had the mark ‘SSS’ which belonged to the appellant; he did not know the appellant’s workers and that the cattle destroyed the crop completely. He told the court that the appellant was not present on the material day.

25. **PW3 Solomon Ole Mboro**, the area Chief testified that he knew the respondent as a farmer growing horticultural crops; that the respondent was cultivated 2 acres; that he also knew the appellant but was not his subject and that the respondent had reported that cattle had damaged his crops and he received reports on two other occasions. He testified that he went to the farm with the agricultural officer and established that crops had been destroyed. He reported the matter to the D.O who called a baraza but the meeting did not take off because the appellant did not attend. Another meeting was called which was attended by the D.C and that the appellant agreed to relocate his cattle but denied liability.

26. In cross-examination, the witness told the court that the respondent had complained on several occasions about destruction of his crops and that he went to the farm and confirmed the destruction. He however told the court that he never saw the cattle destroying the crops.

27. **PW4 Michael Mungai Mbugua** a crop officer working with the ministry of agriculture and based at Mashuru testified that he had been working as a crop officer since 2004; that in January, 2005 the respondent reported damage to his crops; that he visited the farm in the company of the chief, some elders and two police officers and found several crops destroyed. These were mainly Maize and tomatoes and the damage had been caused by cattle. He could not determine area of damage; that the report was made more than twelve times and he visited the farm twelve times.

28. According to the witness, he visited the farm on 11th January, 2005, made the report the same day and the value of the crop destroyed was Kshs. 112,076/- and produced the report as PEX 1. He also made reports for the other days produced them as exhibits. The total damage was assessed at Kshs. 449,649.53

29. In cross-examination, he testified that he wrote the reports based on his own observation; that the cultivated area was about 7 acres; that the crops were destroyed by cattle and confirmed that the respondent also kept cattle. He also stated that the destruction was not total and that he did not take photographs of the damaged crops.

30. The appellant who testified as DW1. told the court that he worked with NYS at Gilgil; that he saw the respondent for the first time in court and that they were not neighbours. He also testified that he did not know the respondent as a member of Mashuru Group Ranch and did not know whether he had land in the Group Ranch. According to the appellant, the period the respondent was referring to was during draught and he could not have let his cattle into a dry area.

31. He also told the court he was charged with illegal grazing and trespass on the respondent’s land but was acquitted. He denied the assertion by the respondent and his witnesses that his cattle had grazed on his crops. He also stated that there are many people whose cattle are branded ‘SSS’ and that he could not see ‘SSS’ on the photographs.

32. In cross-examination, the appellant stated that he did not know why the respondent and his witnesses had ganged up against him; herdsmen are normally given employment letters for security reasons and in case of accidents and that the herdsmen the respondent was referring to were not his employees.

33. After considering the above evidence, the trial court believed the respondents' case and found in his favour with regard to the damage caused on the 9th January, 2005 only and allowed the amount of KShs. 112,076, triggering this appeal.'

34. The issues that arise from this appeal are whether the respondent proved that he appellant's livestock destroyed the appellant's crops; whether the appellant was vicariously liable and whether the respondent proved damages caused.

Whether the respondent proved the case against the appellant

35. I have reevaluated and reassessed the evidence on record as well as considered the impugned judgment. Sections 107, 108 and 109 of the Evidence Act, places the person who alleges is under a duty to prove all the allegations contained his or her claim against the other person. In this regard, the respondent bore the burden to prove his case against the appellant on a balance of probability.

36. This position was emphasized by the Court of Appeal in *Kirugi & another v Kabiya & 3 others* [1987] KLR 347, that:

“The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.”

37. It is therefore a legal requirement that the duty to prove the case is on the person who wants the court to find in his favour. This duty fell on the respondent to prove his case against the appellant on a balance of probabilities.

38. The respondent's case was that the appellant's livestock damaged his crops but the appellant denied this claim. The respondent told the court that his son, (now deceased) told him that cattle had destroyed their crop the son took photographs of cattle. They had marks 'SSS' which they said belonged to the appellant because they matched with initials of the appellant's name.

39. The herdsmen were arrested and are said to have led the police to the appellant's home. The appellant was charged with a criminal offence but was acquitted. Apart from the respondent's deceased son, no other witness saw the cattle graze on the land or the herders.

40. The only reason the respondent believed the cattle belonged to the appellant was because the herdsmen who were herding the cattle were said to have led the police to the appellant's home. No witness testified that he was present when the alleged herders took the police to the appellant's home. There was also no evidence that the herders were appellant's employees to connect the appellant with the ownership of the livestock.

41. Furthermore, there was no evidence that the herders grazed the cattle on the respondent's crops in the cause of their employment and with the appellant's express or implied authority. Only then could the appellant be vicariously liable.

42. The respondent further contended that the mark 'SSS' belonged to the appellant. The trial also court observed in its judgment that it could not have been a coincidence that the appellant's name began with initials 'SSS' just like the marks on the cattle and, therefore, concluded that the livestock belonged to the appellant. With great respect to the trial court, this was at best an assumption that did not amount to proof of ownership. The respondent needed to explain in detail why he thought the mark belonged to the appellant but not because the appellants' name had the three "S" and therefore "SSS" must have belonged to him.

43. There was no attempt at all on the part of the respondent to find out whether there were other people in the area with the mark "SSS" given the appellant's contention that "SSS" was a clan name and therefore had nothing to do with his initials. I do not agree with the trial court that the respondent proved this aspect on a balance of probabilities.

44. Having determined that the respondent did not prove the ownership of cattle, the second issue does not arise for determination. Only where there is proof that the herders were employees of the appellant and were acting in their cause of employment or with the authority of the appellant, would the appellant be held vicariously liable.

45. I have perused the Amended plaint filed before the trial court. The respondent did sue one Mosonik Nkoyo as one of the appellant's herders but did not plead vicarious liability against the appellant on account of the 2nd defendant's actions. The trial court did not also make a finding that the said Musonik Nkoyo was an employee of the appellant and that the appellant was therefore vicariously liable for the actions of the 2nd defendant. Parties are bound by their pleadings and the trial court could not find the appellant liable without proof that the 2nd defendant was liable and therefore as an agent of the appellant, the appellant was vicariously liable. ' 4

46. In *Kaburi Okelo & Partners v Stella Karimi Kobia & 2 others* [2012] eKLR the Court of Appeal held that vicarious liability arises when the tortious act is done in the scope of or during the course of one's employment or authority.

47. In *Sitram Motilal Kalal v Santanuprasad Jaishankar Bhatt* [1966] AIR 1697, the Supreme Court of India stated:

“[27] The law is settled that a master is vicariously liable for the acts of his servant acting in the course of his employment. Unless the act is done in the course of employment, the servant's act does not make the employer liable. In other words, for the master's liability to arise, the act must be wrongful and unauthorised mode of doing some act authorised by the master. The driver of a car taking the car on the master's business makes him vicariously liable if he commits an accident. But it is equally well settled that if the servant at the time of the accident is not acting within the course of his employment but doing something for himself the master is not liable.”

48. And in *Machindranath Kermath Kersar v D. S Mylarappa & others*, Civil Appeal NO 3041 of 2008, the same court, **S.B Sinha, J.**

stated on the meaning of negligence:

“A suit for damages arises out of a tortious action. For the purpose of such action, although there is no statutory definition of negligence, ordinarily, it would mean omission of duty caused either by omission to do something which a reasonable man guided upon those considerations, ordinarily by reason of conduct of human affairs would do or be obligated to, or by doing something which a reasonable or prudent man would not.” (see also *Municipal Corporation of Greater Bombay v Laxman Iyer* 2003 SCC 731, SCC P. 736 par a 6)

49. Guided by the above decisions and from my analysis of the evidence on record, the trial court fell into error in finding the appellant liable for actions of persons that were not proved to be his employees or agents and without the respondent pleading vicarious liability against him.

50. Regarding damage, what the respondent claimed were clearly special damages arising from his damaged crops. A report was made to the police and PW4, a crops officer, visited the firm and established the damage. He made what he said were reports showing the extent of that damage and the estimated value of the destroyed crops.

51. It is now settled law that a claim for special damages must not only be pleaded but must also be specifically proved. The claim for special damages represented what the respondent must have actually lost in the form of the amount used to prepare his farm and what he expected to get in return. He therefore wanted to be put back to the position he would have been had his crops not been destroyed, hence the need to strictly prove the claim.

52. On this point the Court of Appeal held in *Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited* [2016] eKLR, that it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit.

53. It is also a principle of law that a party, who desires the Court to award him special damages, must as a matter of law strictly prove damages to the required standard. In the case before the trial court, the respondent did not adduce any evidence to prove his claim for the loss suffered except photographs and a report from the crops officer (PW4). There were no receipts to show that any money was expended if at all. He merely pleaded damage and used PW4's report to argue that he suffered loss and left it to the trial court award him damages. That is not the strict proof that is required in law.

54. Although the respondent claimed Kshs. 499,649/- as damages for the destroyed crops, the trial court awarded Kshs. 112,076 which it considered proved as the damage caused on 9th January, 2005. This was despite the fact that the respondent was not sure the acreage he had cultivated. Whereas PW2 stated that it was about 2 acres, PW3 put it at 7 acres while PW4 said it was 12 acres. There was no clear evidence before the trial court on the actual loss due to the damaged caused on 9th January, 2005 whose value was assessed at Kshs. 112,076. The report by PW4 merely put the affected area as 0.93 acres with little details to justify the figure he had arrived at.

55. I have carefully perused the assessment report accepted by the trial court for Kshs 112076. The report also merely gives estimates without explaining their source. For instance, there was no cost of ploughing, cost of farm inputs and possible output. The damage payable would be considered against these facts. There was no evidence that the respondent spent any money in the farm. PW4 did not say that he saw receipts to prove that the respondent purchased farm inputs that enabled him calculate the possible damage, and none were produced. What the respondent did was to throw figures at the court and asked the court to award the money.

56. The above scenario was well captured by the Court of Appeal in *Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited* (supra) thus:

“The appellant apart from listing the alleged loss and damage, it did not, according to the respondent, lead any evidence at all in support of the alleged loss and damage. As it were, the appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court to award them. Indeed there was not credible documentary evidence in support of the alleged special damages.”

57. Further, in *David Bagine v Martin Bundi* (CA No. (Nrb) 283 of 1996), the Court of Appeal, referring to the judgment by Lord Goddard CJ in *Bonhan Carter v Hyde Park Hotel Limited* [1948] 64 TLR 177, observed:

“It is trite law that the Plaintiff must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying ‘this is what I have lost’, I ask you to give me these damages; they have to prove it.”

58. From the record and evidence, I am persuaded that the trial court fell into further error by awarding special damages that had not been strictly proved as required by law.

59. Having therefore, carefully considered this appeal, submissions and re-evaluated the evidence myself, I am satisfied that the impugned judgment suffers from legal infirmity and must be interfered with.

60. Consequently, this appeal is allowed and the judgment and decree of the trial court dated 30th October 2014 set aside. In place thereof, the respondent's suit before the trial court dismissed. The appellant shall have costs of this appeal and of the suit before the trial court.

61. **Orders accordingly.**

Dated, Signed and Delivered at Kajiado this 6th day of March, 2020.

E. C. MWITA

JUDGE