REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL APPEAL NO. 32 OF 2019

CHARLES KAMENYI...APPELLANT

VERSUS

BIDCO AFRICA...1ST RESPONDENT

MAINA GATHARA T/A PRESHAMA FEEDS.....2ND RESPONDENT

(Appeal from the judgment and decree of the chief Magistrate's court at Kajiado (M. Kasera, PM) delivered on 15th August 2018 in CMCC No. 24 of 2017)

JUDGMENT

1. The appellant filed a suit before the Chief Magistrate's Court at Kajiado for a claim for special damages of Kshs. 651,250.00 for the death of his dairy cows and loss of earnings of Kshs. 1,642,500/=, general damages for breach of duty of care plus costs and interest.

2. The matter fell for hearing before **Hon. M. Kasera, PM**. The learned magistrate dismissed the suit on 15th August 2018. The appellant was aggrieved with that judgment and filed a memorandum of appeal dated 6th November 2019 and raised the following grounds of appeal, namely:

> **1. The Learned Magistrate erred in law and fact in holding that it was only the appellant that complained of food poisoning in the absence of evidence in support of such a finding;**
>
> **2. The learned magistrate erred in law and fact in holding that the appellant's animals died of other poisoning other than the dairy feeds bought from the respondents;**
>
> **3. The learned magistrate erred in law and fact by ignoring the evidence adduced by the PW2, a veterinary doctor that the appellant's animals died as a result of afflatoxin poisoning;**
>
> **4. The learned magistrate erred in law and fact in relying on the evidence of DW2 which evidence was not supported by reports or studies to show the effects of various levels of afflatoxin in the animal feeds;**
>
> **5. The learned magistrate erred in law and fact in dismissing the appellant's suit with costs to the respondents.**

3. Parties agreed to dispose of the appeal by way of written submissions and both parties filed their respective written submissions and urged the court to determine the appeal on the basis of those written submissions.

4. The appellant submitted that the trial court was erred when it held that only the appellant complained of poisoning of his dairy cows yet the respondent did not lead any evidence to show that no other farmer had complained. According to the appellant, it is possible that no other farmer complained because their animals did not die. The appellant argued that PW2 testified that not all animals that fed on the feed died but that only those pregnant had died.

5. The appellant also argued that PW3 testified that whereas no other deaths had been reported, other farmers had complained that their animals were not eating well. He submitted that there was a possibility that only feeds supplied to him were contaminated with aflatoxin and for that reason, the trial magistrate was not justified to make a finding that was not supported by evidence.

6. On ground 2, the appellant faulted the trial magistrate for holding that the appellant's animals died of other causes other than feeds from

the respondents. He argued that the trial court's finding was contrary to the evidence of PW2, a Veterinary doctor who testified that he examined the animals and concluded that they suffered from aflatoxin poisoning.

7. He also argued that the laboratory report on the testing of the feeds purchased from the respondents showed that aflatoxin level in the dairy meal was 41.91ppb. The appellant submitted, referring to the evidence of DW2 that aflatoxin level of 41.91ppb cannot kill cows, that the same witness stated in his statement filed in court that the company had set standards so that aflatoxin level is to be below 20ppb and that any raw material with aflatoxin above the set standard is rejected and cannot be used in the manufacture of dairy meals and finished products.

8. The appellant went on to argue that there is a reason why the 1st respondent set aflatoxin level at 20ppb. He contended that from the lab report on the test done over the feeds purchased from the respondents, aflatoxin level was more than thrice the maximum level recommended. The appellant urged the court to believe the evidence of PW2 who confirmed that the cows died due to aflatoxin and disregard the evidence of DW2, a quality consumption controller.

9. The appellant further argued that the cows could not have died due to aflatoxin in hay because PW2 testified that the cows were feeding on concentrates and napier grass and not hay and that there was no evidence that the cows died of any other poisoning other than aflatoxin found in the feeds purchased from the respondents.

10. Regarding grounds 3 and 4, the appellant faulted the trial court for not giving any weight to the evidence of PW2, a veterinary expert, but put more weight on the evidence of DW2 whose evidence was only that the aflatoxin levels in the feeds sold to the appellant could not kill the cows. According to the appellant, the respondents did not adduce evidence to show the aflatoxin in the dairy meal did not kill the cows; that lab tests showed that the feed had aflatoxin levels of 41.91ppb and that all cows that fed on the feeds from the respondents had signs such as anorexlea, depression, photosensitization, lack of normal movement and dark tan diarrhea.

11. The appellant argued, relying on section 48 of the Evidence Act, that PW2 is an expert whose evidence should be believed. He also relied on ***Mutonyi & Another v Republic*** [1982] eKLR for the proposition that expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge from the facts reported to him or discovered by him by tests; measurements and the like.

12. He further relied on ***Ukwala supermarket (Kisumu) Limited v Kenindia Assurance Company Limited*** [2017] eKLR on the definition of expert as a person who through education or experience has developed skill or knowledge in a particular subject so that he or she may form an opinion that will assist the fact finder.

13. It was the appellant's case that the trial magistrate was in error in relying on the evidence of DW2 which was not supported by reports or studies. He relied on ***Rose Kaiza v Angelo Mpayu Kaiza*** [2009] eKLR, citing the authority *in* ***Dhalay v Republic*** [1993] EA 29, for the argument that where a qualified expert gives an opinion and reasons therefor and there is no other evidence in conflict with such opinion, then such opinion is not for rejection. It can only be rejected where the court is satisfied on grounds that the opinion is not reasonably sound.

14. On ground 5, the appellant argued that the trial magistrate failed to consider the evidence of PW2 on what killed the cows and therefore arrived at a wrong decision.

15. The respondents submitted through their written submissions dated 24th June 2020, that since the appellant's case was based on alleged negligence on the part of the respondents who manufactured and sold alleged substandard and poisonous feeds, the onus was on the appellant to establish on a balance of probabilities that they owed him a duty; that they breached that duty and that the appellant suffered as a result of the breach.

16. The respondents relied on ***Stalpack Industries v James Mbithe Munyao*** [2005] eKLR for the argument that regarding causation, it is trite law that the burden of proof of any fact or allegation is on the Plaintiffs who must prove a causal link between someone's negligence and his injury. The respondents argued that the appellant failed to discharge the burden of proof envisaged by section 107 of the Evidence Act.

17. The respondents further relied on **Halsbury's laws of England** 4th Edition page 476 paragraph 662, for the submission that the burden of proof in an action for negligence rests primarily on the plaintiff, who to maintain an action, must show that he was injured by a negligent act or omission for which the defendant is in law, responsible, which involves proof of some duty owed by the defendant to the plaintiff; some breach of that duty, and an injury to the plaintiff. In that regard, a plaintiff must prove a causal connection between the breach of that duty and the injury suffered. They argued that there was no direct evidence to prove that the damage suffered was as a result of their negligence.

18. According to the respondents, PW3 testified that he regularly purchases feeds from the 2nd respondent and sells them to the appellant who is a regular customer. She however stated that only the appellant complained about the feeds. No other customer complained. They submitted that according to DW1 who distributes feed to the 2nd respondent and to various customers in the country, no other stockist complained about the feeds except **Christine Nungari.** They therefore argued that the fact that no complaints were received from other customers disproved the appellant's claim that the feeds were substandard.

19. On ground 2, the respondents submitted that the appellant's evidence was that he purchased the feeds on 12th October 2016; feed them his cows and resulted into death on 13th October2016 due to aflatoxin. They argued that PW2 testified that it takes several weeks for aflatoxin to react and that aflatoxin that causes death is should be 20ppb or higher and after long exposure.

20. According to the respondents, the cows died within a day after being fed and therefore PW2's evidence would appear to exonerate the respondents. They also argued that DW2, a quality consumption controller with the 1st respondent, confirmed that the 1st respondent complies with KEBS standards in its operations and, therefore, based on the evidence on record, the trial court was right to hold that the cows

died of other causes.

21. On ground 3, the respondents argued that the trial court carefully considered the evidence of PW2 before reaching her determination. They further submitted that the trial court is not bound by an expert opinion. They relied on **Kimatu Mbuvi t/a Kimatu Mbuvi & Bros v Augustine Munyao Kioko** [2007] I EA 139 (CA No. 203/2001), for the argument that an expert opinions is not binding on the court although it will be given proper respect. The respondents contended that although there may be no doubt that the appellant's cows died, there was no clear and conclusive evidence that they died due to aflatoxin from the feeds manufactured by the 1st respondent and distributed by the 2nd respondent.

22. On ground 4, the respondents submitted that DW2 gave cogent evidence and produced exhibits which showed the aflatoxin levels in feeds manufactured 1st respondent and distributed by the 2nd respondent. They argued that their evidence was not controverted and, therefore, the appellant could not argue that the respondents offered no evidence on the levels of aflatoxin in feeds. They urged the court to dismiss the appeal with costs.

23. I have considered this appeal, submissions by parties and the authorities relied on. I have also perused the record of the trial court and considered the impugned judgment. This being a first appeal, it is like a retrial and this court, as the first appellate court, has a duty to reanalyze, reexamine and reconsider the evidence afresh and come to its own conclusions on it. (See **Sielle v Associated Motor Boat Company** [1968] EA 123).

24. 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."**

25. Further, in **PIL Kenya Limited v Oppong** [2009] KLR 442, it was held that:

> **"It is the duty…of a first appellate court to analyze and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeking the witnesses and their demeanor and giving allowance for that".**

26. PW1 Charles Kimenyi, a dairy farmer in Ngong Kajiado County, testified that on 11th November 2016 he purchased 3 bags of feeds manufactured by the 1st respondent from Elizabeth Wangui Wangari for his dairy cows. The feeds had been distributed by the 2nd respondent. his dairy cows were fed on the feeds the following morning. He later got a report from his worker that all the cows that were fed on the feeds were sick. He called PW2 a veterinary doctor who went sampled the feeds in three different packets and asked him to take the packets to the University of Nairobi for examination. PW2 asked him to stop feeding the cows on the feeds. Three in- calf cows died.

27. He told the court that the three cows that died were worth Kshs. 200,000 each; that each cow was producing 25 litres of milk per day and he was selling Kshs. 60/= per litre. He blamed the respondents, a manufacturers and distributor respectively for the deaths. In cross-examination, the appellant told the court that he bought the 3 bags of feeds on 12th October2016 and fed the cows on the feeds but 3 cows died due to afflatoxin that was in the feeds. He admitted that he did not take the other feeds for testing and that he returned the remainder of the bags of feeds to the stockist so that the manufacturer could be informed. He also admitted that he had nothing to show that the cows cost Kshs. 200,000/= each. He told the court that although he had 20 cows, he only fed the feeds to the in-calf cows.

28. PW2 Dr. Njuguna Ndungu a practicing veterinary doctor, testified that on 12th November 2016, the appellant called him and when he went to his farm, he found 10 cows out of a herd of 26 unwell. The cows were lactating and in calf. The temperatures, heart beats and respiratory rates were normal but all of them were depressed and were avoiding light. His first thought was about poisoning. He examined the feeds in the farm and found Napier grass, hay and maize jam and Bidco products. Since the cows had no temperature, he narrowed down his opinion to poisoning. He stabilized the cows with Sulphur vitamins B2 and multi-vitamins for 5 days and advised the appellant to discontinue the feeds.

29. He took samples to the University of Nairobi for examination. On the following day, the in calf cows had deteriorated which he attributed to stress. The first cow died and when he performed post mortem, it had bleeding from the internal organs; the liver, kidney and intestinal wall. The second cow died and post mortem results were similar so was the third cow. His diagnosis was poisoning through aflatoxin. He got the report from the University of Nairobi signed by Dr. E.K Kangethe and Dr. Gitau which found that there was 41.91ppb of aflatoxin.

30. He sent the appellant to Kenya Bureau of Standards (KEBS) to get recommendations on the level of aflatoxin allowed in feeds. He testified that the level of 41.91ppb cannot kill cows though KeBS recommends the levels of 10 ppb and therefore 41.91 ppb was on the higher side in the circumstances. He concluded that aflatoxin was the cause of the death of the cows.

31. In cross-examination, the witness told the court that the cows were poisoned because they had no excess temperature; that he was called to treat the animals on 12th October 2016; that aflatoxin is caused by moulds that grow on feeds at high temperatures and that it takes several weeks for aflatoxin to react. He also told the court that aflatoxin levels of 20ppb and above after long exposure causes death. He also told the court that when he went to the farm the cows had no appetite. He found them feeding on concentrates, Napier grass and hay. He produced the lab tests report as an exhibit.

32. PW3 Christine Wangare, a feeds stockist, testified relying on her witness statement dated 21st April 2017, that she buys feeds from distributor Presham feeds owned by Gakara Francis; that the appellant purchased 3 bags of feeds from her on 13th October 2016 and later complained that his cows were unwell and he suspected the feeds he had purchased from her. She asked him to return the feeds which she

later disposed of. She informed the salesman that her customer was complaining about the feeds. She produced receipts for purchase and sale as exhibits 5(a) and (b).

33. In cross-examination, the witness told the court that she brought the feeds from the 2nd respondent on 11th October2016 and sold them to the appellant on 12th October 2016. She got a report on the same day at night. She also told the court that she sold 12 other bags of the same feeds but got no complaint from the other customers. She stated that she still purchases stock of feeds from the respondents and she has not received any other complaint.

34. DW1 Onesmus Maina Gatura, a distributor for both the 2nd respondent and Isinya Feeds since 2013, testified that he distributes feeds in various parts of Kiambu, Nakuru and Kajiado Counties; that on 11th October 2016 he sold 15 bags of dairy feeds to Christine in Bulbul. He later received a complaint from the sales person that the feeds were not good. He however did not get back the feeds. He told the court that they did not receive complaints such as milk reduction. He also told the court that no animal had ever died because of the feeds and that they get 2 trucks of feeds daily from the 2nd respondent and distributes them the same day. He further testified that they distribute the feeds as received and do not open them. No other stockist complained except Christine Wangare.

35. In cross-examination, the witness told the court that he received over 300 bags and had two stores one at Ndumberi and another at Kinoo. He stated that although he received a complaint through the salesman the feeds were not returned. He stated that he did not know how long the feeds stayed at Christine Wangare's store.

36. DW2 Flora Muthoni Njeri, animal health specialist working with the 1st respondent as quality administration controller, testified that her work involves testing aflatoxin levels and food protein. She told the court that they operate within KBS Standards. According to the witness, afflatoxin are poisonous materials which can be accelerated by prolonged storage. They can also be found in the soil. She also stated that nicotine can be found in hay depending on how it is stored. She testified that they only accept raw materials with moisture content of 12%.

37. Referring to the lab report, PEX1, she told the court that the 1st respondent does not manufacture maize jam but manufactures only dairy meal. She further told the court that aflatoxin level of 41.9ppb cannot kill cows and that even higher aflatoxin level of 50.00ppb cannot cause death except after a long period of feeding. Regarding the post mortem report PEX2, she told the court that the signs were not for cow that died of from aflatoxin. According to her the cows were showing signs of East Coast Fever. She also told the court that their feeds comply with KEBS standards. Again referred to DEX2, the witness testified that the cows did not die from the feeds manufactured by the 1st respondent. In cross-examination, she told the court that they were not informed of the compliant; that she could not tell what killed the cows and that Napier grass too has aflatoxin.

38. After considering that evidence, the trial court concluded that the appellant had not proved his case on a balance of probabilities and dismissed the suit, prompting this appeal. The appellant has blamed the trial court on various grounds. First, that the trial court was wrong in holding that only the appellant complained about the feeds; that the appellant did not show that any other person complained of the 1st respondent's products distributed by the 2nd respondent; that the court was wrong for concluding that he did not prove special damages and that the trial court was therefore wrong in dismissing his suit.

39. The respondents maintained that the appellant did not prove his case against them that his cows died as a result of the 1st respondent's feeds distributed by the 2nd respondent

40. I have considered the appeal and reevaluated the evidence on record. There is no dispute that the appellant's three dairy cows died on or about 13th October 2016. What is in dispute however, is the cause of death. The appellant maintains that his cows died from aflatoxin that was in the feeds manufactured by the 1st respondent and distributed by the 2nd respondent. He relied on the evidence of PW2, the veterinary doctor who was called to treat the cows and conducted the post mortem.

41. PW2 told the court that when he was called to the appellant's farm, he found the cows feeding on concentrates, Napier grass and hay. 10 cows out of 26 unwell. Those unwell were lactating and in calf. Although temperatures, heart beats and respiratory rates were normal, they were depressed. They were also avoiding light. Since the cows had no temperature, he suspected poisoning. He was clear in his evidence that when he went to the farm, found Napier grass, hay and maize jam feeds as well as dairy meal feeds from the 1st respondent. He however took samples from dairy meals for testing.

42. The post mortem performed on the dead cows showed internal bleeding from internal organs which he attributed to aflatoxin poisoning. The tests report showed the level of afflatoxin to be 41.91ppb.This witness testified that although KEBS recommends afflatoxin level of 10ppb, a high of 41.91ppb cannot kill cows. He however concluded that aflatoxin was the cause of death of the cows. According to this witness, aflatoxin is caused by moulds that grow on feeds at high temperatures and that it takes several weeks for aflatoxin to react.

43. DW2**,** an animal health specialist whose work involves testing aflatoxin levels and food proteins in animal feeds told the court that the 1st respondent operated within KBS Standards. She also told the court that aflatoxin can be accelerated by prolonged storage. According to her, they only accept raw materials with moisture content of 12%. She maintained that the 1st respondent only manufactures dairy meal and not maize jam. She further told the court that aflatoxin level of 41.9ppb cannot kill cows and even afflatoxin level of 50.00ppb cannot cause death except after a long period of feeding. She maintained that Napier grass too can have aflatoxin. According to her the cows were showing signs of East Coast Fever.

44. PW2 found the cows feeding on concentrates, Napier grass, hay and maize jam. He did not argue that maize jam hay or Napier grass cannot contain afflatoxin as DW2 suggested. He did not take the other feeds for testing. PW2's evidence was that afflatoxin of 41.91 cannot kill. He seems to agree with DW2 that afflatoxin of that level cannot kill. If the cows died from afflatoxin, was it from feeds manufactured by

the 1st respondent and distributed by the 2nd respondent only given that the other feeds were not tested?

45. The appellant was under a legal duty to prove his case against the respondents on a balance of probabilities. Section 107 of the Evidence Act is clear that **"whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."**

46. 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**.** The appellant was required to prove that only feeds from the respondents had afflatoxin and that the cows died from afflatoxin in those feeds and not any other. This he failed to do.

47. The appellant also argued that respondents were negligent and that his cows died due to that negligence. This too, he was required to prove that indeed the 1st respondent was negligent in the manufacture of the feeds and establish negligence attributable to the 2nd respondent, a distributor.

48. The evidence on record is that afflatoxin results from poor or prolonged storage of feeds at high temperatures. There was no evidence that the feeds the appellant purchased had been poorly stored by either the respondents or the person he purchased the feeds from. PW2 did not also testify how he found the feeds stored by the appellant given that there were other feeds in the farm so as to attribute negligence to the respondents.

49. In **Machindranath Kermath Kersar v D. S Mylarappa & others**, Civil Appeal NO 3041 of 2008, **S.B Sinha, J.** writing for the Supreme court of India, 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).

50. The appellant did not show that the respondents' acts either of commission or omission, in their ordinary cause of duty or circumstances amounted to negligence for which they should be held liable for damages.

51. The appellant argued that each of the dead cows cost Kshs. 200,000/=; that each produced 20 litres per day and that he sold a litre for Kshs. 60/= which he sought to be compensated. He blamed the trial court for not finding that he was entitled to compensation.

52. I have considered the appellant's claims in this regard. What the appellant claimed were, without a doubt, special damages arising from the loss he said he suffered from the death of his three cows. There was, however, no evidence that each of the dead cows cost Kshs. 200,000/=; that each produced 20 litres of milk and that he sold a litre at Kshs. 60/=.

53. It is strite law that a claim for special damages must not only be pleaded but must also be specifically proved. This is because a claim for special damages represented what the appellant may have actually lost in the form of the amount used to buy the cows and what he was to get in return. He therefore would have wanted to be put back to the position he would have been had his cows not been died, hence the need to strictly prove these claims.

54. In **Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited** [2016] eKLR, the Court of Appeal reiterated the fact 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.

55. It is 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. There were no receipts to show that any money was expended to purchase the cows, if so, how much, no records of milk production and no sales records. He merely pleaded that he suffered loss and damage and left it to the trial court to award him damages. That is not the strict proof that is required in law.

56. Addressing a similar situation in **Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited** (supra), the Court of Appeal observed:

> **"The appellant apart from listing the alleged loss and damage, it did not…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. And in **David Bagine v Martin Bundi (CA No. (Nbi) 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),** once again observed that:

> **"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 not persuaded that the trial court was in any way to blame for the decision it arrived at. The appellant had not proved his case as required by law.

59. In the end, having, carefully considered this appeal, submissions and re-evaluated the evidence myself, I find no merit in the appeal. It is dismissed with costs.

Dated, Signed and Delivered at Kajiado this 25th day of September 2020.

E. C. MWITA

JUDGE