



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL APPEAL NO. 161 OF 2015

RONALD M. KAMUTI.....APPELLANT

VERSUS

MUSEMBI MWASYA.....RESPONDENT

(Being an appeal from the original Judgment in Mwingi Senior

Resident Magistrate's Court Civil Case No. 98 of 2008

by Hon. H. M. Nyaberi S R M on 03/02/10)

J U D G M E N T

1. **Ronald M. Kamuti**, the Appellant, sued **Musembi Mwasya**, the Respondent claiming for **Kshs. 41,284.80 cts**, costs and interest at court rates from **6th April, 2008** till payment in full. It was his case that the Defendant's sheep trespassed onto his farm and damaged his crop an act that made him incur loss.
2. In his statement of defence, the Defendant denied liability and averred that the suit was brought following a continued vendetta by the family of the Plaintiff against that of the Defendant.
3. The case was heard by the trial court which reached a finding that no report of the damage occasioned was made to the police station for independent investigations to be carried out; key witnesses were not called to testify; and no particulars of negligence on the part of the Defendant were pleaded. Consequently, the Plaintiff's case was dismissed with costs.
4. Being aggrieved by the decision of the court, the Appellant appealed on grounds that the learned Magistrate erred in law and facts as:
 - The case was proved on a balance of probability.
 - A report to the police was not necessary as this was a civil suit and not a criminal case.
 - The assessment of an Agricultural Officer that was vital was not taken into consideration.
 - Evidence adduced by the Plaintiff and his witness was eye witness evidence.
 - The case was founded on tort of trespass in which negligence is not an ingredient.

- Awarding the Respondent costs was erroneous as the Plaintiff proved that his crops were damaged.

5. The appeal was canvassed by way of written submissions that I have duly taken into consideration.

6. This being a first appellate court, I am duty bound to re-evaluate the evidence, assess it and make my own conclusions. **(See Selle vs. Associated Motor Boat Company LTD (1968) EA 123,126).**

7. In his testimony PW1 **Ronald K. Kamuti** the Plaintiff stated that the animals trespassed into his farm. Although he did not adduce evidence of ownership of the farm, it was not in dispute therefore there was proof of at least exclusive possession of the farm on which the tort of trespass is alleged to have been committed. The animals entered the farm in his absence. However, he got information from his employee **Mutisya**. He went to the land in company of **Mutisya** his workman and the Defendant's herder one **Mutua**, and they drove the animals to the Defendant's shop and handed them over to his wife in the presence of the village elder.

8. The Plaintiff did not call his workman who found the sheep grazing on the crop but he called PW2 **Josephat Mutisya**, the village elder who witnessed when the sheep were handed over to the wife of the Defendant and the assessment of the damage caused. In his defence the Defendant, **Musembi Mwasya** stated that indeed the sheep were taken to his wife who confirmed that they belonged to them but their herdsman, one **Mutua** said that the Plaintiff was claiming that the sheep had entered his farm and destroyed the crop. However, he did not take him to the farm. He was summoned by the Chief but he did not go. DW2 **Benedetta Munyange**, the Defendant's 2nd wife confirmed that the sheep were taken to her.

9. In his judgment, the learned trial Magistrate stated that the matter was not reported to the police to facilitate carrying out of independent investigations. The claim herein is civil in nature. It is pleaded in Paragraph 3 & 4 of the Plaintiff that:

“3. On diverse dates between 6th April, 2008 and 8th April, 2008 (both dates inclusive) the defendant's flock of 16 sheep wrongfully and unlawfully entered into the plaintiff's farm within Mivukoni Location and spent two (2) nights there and damaged the plaintiff's crop viz'- pigeon peas, cotton and delichus lab lab (mbumbu).

4. The said trespass by the said flock of 16 sheep was without the consent or encouragement of the plaintiff and as a result the plaintiff reported the same to the area Chief of Mivukoni Location who referred the plaintiff to the Divisional Agricultural Extensional Officer at Kyuso.”

10. This was a case of trespass which is actionable per se therefore proof of investigations having been conducted by the police was not necessary.

11. It was stated by the learned Magistrate that the Plaintiff had a duty of establishing negligence on the part of the Defendant's herdsboy. Further, he stated that no particulars of negligence were pleaded in the plaintiff regarding the Defendant and/or his agent.

12. The learned Magistrate misdirected himself on this aspect of the law. This was a case of trespass which does not necessarily require proof of even general damage as in negligence or nuisance. The Plaintiff who was aggrieved moved to court to have his civil rights protected.

13. When the animals trespassed onto the Plaintiff's land they were there overnight per evidence adduced. The herdsman appeared later to find the animals on the Plaintiff's land. When the Respondent was summoned by the area Chief he did not go. He alleged that he sent his wife to represent him who did not. In the matter the Respondent on being sued applied for a third party notice to issue for **Mutia Musyimi** his worker claiming contribution and/or indemnity from him. In his supporting affidavit he stated that he was the one responsible for the livestock on the material date as he was herding the animals. Leave was granted as prayed but he did not seem to have pursued the issue further.

14. Although he denied the claim, on a balance of probabilities, it was established that the sheep handed over to his wife (DW2) were removed from the farm of the Plaintiff. The sheep trespassed onto the Plaintiff's farm. Having belonged to the Defendant he must be treated as if he committed the act of trespass himself. Therefore he is liable to pay for the damage caused because trespass is actionable perse.

15. The damage caused was assessed by PW3 **Patrick Musau**, a Divisional Crop Development Officer in the absence of the Defendant having disregarded a letter inviting him to be present. The total damage caused to the crops was estimated at **Kshs. 36,784.80 cts.**

16. Having re-evaluated evidence adduced I find the appeal having merit. Therefore I set aside the judgment of the Lower Court and enter judgment for the Appellant in the sum of **Kshs. 36,784.80 cts** with interest and costs.

17. It is so ordered.

Dated, Signed and Delivered at Kitui this 22nd day of September, 2016.

L. N. MUTENDE

JUDGE