



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL NO. 20 OF 2015
(FORMERLY KISII HCCA NO. 78 OF 2012)

BETWEEN

JOSHUA OKECH ODEROAPPELLANT

AND

NATHAN OWINO ODILA RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. R.C.B. Ngetich, SPM in Oyugis Senior Principal Magistrates Court Civil Case No. 85 of 2010 dated 10th May 2012)

JUDGMENT

1. In the subordinate court, the respondent filed a suit in which he claimed that on 11th March 2010, the appellant's 9 head of cattle entered his land, WEST KASIPUL/KANUONGA/802, and destroyed his cassava plantation valued and assessed at Kshs 44,790.00. Judgment was entered in his favour.
2. The appellant, who denied the respondent's claim, now appeals against the judgment on the basis of the grounds set out in the memorandum of appeal. The totality of the grounds of appeal is that learned magistrate failed to analyse the evidence, consider the defence and come to the conclusion that the respondent had not proved his case. For ease of reference, I shall refer to the parties' respective capacities as they were in the subordinate court.
3. Several issues are not in dispute. First, that the plaintiff was the owner of the cassava plantation. Second, the value of the destroyed cassava was Kshs. 44,790.00 and that the cattle subject of the dispute belonged to the defendant.
4. Counsel for the appellant attacked the learned magistrate's reasoning on the ground that it was perfunctory and that she did not consider the evidence of DW 1 and DW 2 which showed that the cattle went to the plaintiff's farm by reason of his own act and not that of the defendant's grandchildren.
5. Counsel for the respondent argued that the learned magistrate's reasoning was unassailable as the trial court is the one that heard and saw the witnesses and came to a proper conclusion supported by the evidence.
6. As this is the first appeal, the parties agree that this court is entitled to analyze and evaluate the evidence and come to an independent conclusion as to whether to uphold the trial court judgment bearing in mind that it never saw or heard the witnesses testify (see *Selle v Associated Motor Boat Co. [1968] EA*

123).

7. The main issue was the circumstances under which the animals entered into the respondent's land. In order to resolve this issue, I will outline the key testimony emerging from the witnesses. The plaintiff called four witnesses. The plaintiff stated as follows:

On 11th March 2010 at about 6.00pm I heard screams saying many cattle were in the farm. I and my wife went to the farm. On reaching there I found 9 herds of cattle in the farm. I did not see the people who had cattle. I and my wife drove the cattle to the chief's office.....

8. PW2, a farmer, who was a neighbour to the plaintiff, testified that:

I went to the farm to plug vegetables. It was between 6 and 6:30am. Saw cows grazing in the farm. I screamed out saying Ongori, Ongori, Ongori is the owner of the farm.... [He] came running with a stick and drove the cattle out of the farm. Cassava was in the farm.....I saw two young [boys] in the bush. When I was shouting I saw a young child running away from the farm.

9. PW3, who was nearby, testified as follows;

As I approached the river I heard PW1 screaming that cows are grazing on cassava. I came and passed the river. I found the plaintiff who told me to help him drive out the cattle from the cassava farm. After he had driven the cattle out of the farm his wife came.....

10. On the other side, the defendant and his children testified. The defendant stated that he received information that the plaintiff had taken his animals after they had grazed on his cassava. He stated that the plaintiff chased his children as they were taking the animals to the river. DW 1, a grandson of the defendant, testified as follows;

At around 6:00pm we took our animals to the river. The plaintiff was following us while armed with a stick and a panga. He came and asked us why we had taken our animals to the river. He chased us. We ran back home and informed our grandfather.....

DW 2, another grandson of the defendant testified that;

On a date I cannot recall in March 2010 we were taking animals to the river. We met the plaintiff. He had a panga and a stick. He took our animals and chased us away. We went back home

11. After hearing the matter, the learned magistrate found the appellant liable. She expressed herself as follows;

I have considered the evidence. From the evidence adduced there is no doubt that the plaintiff's cassava were destroyed..... Defendant in his defence said he admitted at the police station when he went to report assault by the plaintiff that his animals destroyed plaintiff's cassava. If it was not so why did he admit. PW2 also confirmed that he saw the animals destroying cassava and called for help. He was with PW... who confirmed the same. PW3 assisted plaintiff driving the animals from the farm.

12. I have considered the testimony and I find that the learned magistrate did not consider the evidence of DW 1 and DW 2 or if she did, she did not state why she disregarded it or preferred the plaintiff's witnesses to those of the defendant. In my view, the learned magistrate put too much weight on the admission that the appellant made to the police that it is his animals which grazed at the cassava plantation when there was no dispute that the animals grazed on the cassava plantation. The issue as identified by the appellant is who was to blame for the animals straying into the cassava plantation. Was it the plaintiff or defendant? It must also be recalled that in resolving this issue, the burden is on the plaintiff to prove his case on the balance of probabilities.

13. After evaluating the evidence, I find that the testimony of PW 2 was decisive. He was an independent witness. He had no personal grudge with either the plaintiff or the defendant. He was on his farm close by when he saw the animals on the plaintiff's cassava plantation causing him to call the plaintiff. He is the one who alerted the plaintiff by screaming causing the plaintiff to come to the farm and chase the cattle away. PW 3 buttressed the plaintiff's position by testifying that he assisted PW 1 to chase away the animal from the farm. This means that the cattle were already on the plaintiff's farm before he came to chase them away.

14. If DW2 and DW3 are to be believed, then the appellant would have been at the cassava chasing the cattle before PW 2 raised alarm. Furthermore by the time the plaintiff came to the chase DW 2 and DW 3, the cattle were already on the cassava plantation.

15. I affirm the judgment. The appeal is dismissed with costs to the respondent which I assess at Kshs. 15,000.00.

DATED and DELIVERED at HOMA BAY this 20th day of March 2015.

D.S. MAJANJA

JUDGE

Mr Oguttu-Mboya instructed by Oguttu-Mboya and Company Advocates for the appellant.

Mr Masese instructed by Masese and Company Advocates for the respondent.