



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL NO. 46 OF 2014
(FORMERLY KISII HCCA NO. 164 OF 2013)

BETWEEN

BOKE SAGIRE MAROA APPELLANT

AND

CHARLES MONANKA NYAMOHANGA 1ST RESPONDENT

CHACHA KENEGA 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. A. P. Ndege, Ag PM at the Principal's Magistrates Court in Kehancha in Civil Case No. 23 of 2011 dated 22nd November 2013)

JUDGMENT

1. According to the plaint filed in the subordinate court, the appellant claimed that on or about 1st April 2011, the respondents, unlawfully and without any justifiable cause or colour of right seized and took away the his 8 head of cattle comprising 5 bulls, 2 heifers and a calf. They later returned 5 head of cattle and retained 2 bulls and 1 heifer which had delivered after seizure. He claimed the return of the three head of cattle or their monetary equivalent of Kshs. 47,300/=, costs and interest.
2. The respondents denied the claim in their defence dated 16th November 2011.
3. The duty of the first appellate court is to review the evidence and reach an independent conclusion as to whether to uphold the decision of the subordinate court bearing in mind that it neither heard or saw the witnesses testify (see *Selle v Associated Motor Boat Co. [1968] EA 123*). In order to do so it is necessary to set out the facts as they emerged from the witness testimony.
4. On the night of 26th and 27th January 2009, the 1st respondent had employed DW4, Joel Chacha, at his Bam Bam Bar at Ikerege. DW 4 testified that the bar was attacked and robbed by Gentengai and Nyamohanga. Thereafter, the 1st respondent, Charles Nyamohanga, made a report to Kehancha Police Station and while the investigations were still pending he was tipped off that Gentengai and Nyamohanga had been seen. He decided to report the matter to the community police (*sungu sungu*). Charles Getangita (DW 3) and Omahe Mwita (DW 5), both community policing leaders received the report and proceeded to investigate the matter. They confirmed that Getengai and Nyamohanga were the thieves who had stolen from Charles Nyamohanga. In the course of investigation they discovered that Getengai had driven two cows; a black female cow without horns and a white spotted bull with horns to the appellant who received the cows.

The appellant testified that his cows were at the home of PW2, Machera, his nephew, when they were later taken away by the *sungu sungu* on 1st April 2011 who included DW 5 and others. The cows were then used to compensate the Charles Nyamohanga for the theft that occurred.

5. The manner in which the cows were given to the 1st respondent was the result of a community meeting held with elders, the *Itorongo*. What emerged from the meeting which was attended by the appellant and the 1st respondent is that the appellant's cows were handed over to the 1st respondent as compensation for the theft committed by Getangai. This was despite the fact that the appellant informed them that he had bought the cows from Getangai. The meeting which took place at the Chief's Camp was evidenced by some minutes dated 5th March 2011 which were produced by the 1st respondent. Translated in English, the minutes read in part as follows;

When Mzee Boeke Sagirai arrived at the meeting which was held at Ikerege Chief's camp and attended by about 920 members, Mzee Boke informed the meeting that the truth is that the cows are Getengai Chunchuria's but I had purchased them as follows The meeting informed him that because the cows belong to a thief, Getengai who stole them from Mwalimu Charles Monanka. And the meeting resolved that it will assist Mzee Boke to look for Getengai so that he refunds Mzee Boke his cows which he had purchased for Kshs. 32,300. That is the decision of the community policing whose meeting was held at Ikerege Chief's camp on 02/04/2011.

7. The respondents argued that they were not liable as the matter had been resolved by an alternative dispute resolution process which is permitted by **Article 159(2)(c)** of the Constitution which enjoins the court to promote alternative dispute resolution processes. The learned magistrate considered the circumstances of under which the appellant was ordered to hand over the cattle and held that it violated his rights to a fair trial, fair process and the right to acquire and own property. Thereafter, the learned magistrate held that the appellant's claim, which is in the nature of special damages, was not pleaded and proved as required by the law and as a result dismissed the claim.

8. The appeal is against dismissal of the claim. The appellant, in his rather prolix memorandum of appeal, has set out 17 grounds of appeal focusing on the validity of the alternative dispute process that led to the cattle being given to the 1st respondent. Distilled to its essence, the appellant's argument is that despite the finding that the respondents' actions were improper, he did not award the appellant damages and went on to dismiss the claim.

9. The respondents support the decision of the subordinate court on the ground that alternative dispute resolution processes are permitted by the Constitution and that the appellant did not prove the special damages with particularity required by the law.

10. The respondents did not cross-appeal against the finding by the learned magistrate that the process in which the appellant's cattle were taken and given to the 1st respondent violated the appellant's rights. DW 1, in his evidence clearly admitted that he received the 2 cows which were given to him. The result of this finding is that the 1st respondent was not entitled to receive the cattle and that they rightly belonged to the appellant.

11. The only issue then is whether the appellant proved that he was entitled to the cattle or their value as per the amount prayed in the plaint. The learned magistrate considered the law concerning pleading and proof of special damages which had been elucidated in many decisions of our courts among them *Jivanji v Sanyo Electrical Company Limited* [2003] 1 EA 98 and *Kenya Shell v Benjamin Kibiru CA Civil Application No NAI 97 of 1986 (UR)*.

12. In his testimony the appellant stated that, "*Charles (the 1st respondent) got 2 and Chacha Kenega (the 2nd respondent) got 1. The three went and delivered thereafter, the three cows are worth Kshs. 75,000/-. I am however praying for Kshs. 47, 300/-. The value of 3 cows as per my pleadings.*"

13. The learned magistrate held that the appellant had failed to prove the claim because he did not adduce evidence of the cost of each cow or the bull or their market value. He saw a contradiction between Kshs. 75,000/- stated by the appellant in his testimony and the amount pleaded. The respondents contended the value of the cows ought to have been proved by expert opinion.

14. In this case the appellant clearly pleaded that the value of the cows was Kshs. 47,300/-. In his evidence he produced a memorandum of sale from Getangita which showed that he bought the two black cows at Kshs. 16,500/- and one spotted one at Kshs. 15,800/-. This was confirmed in the evidence of the meeting whose minutes I have set out above. The admitted value of three cows was therefore Kshs. 32,300/-.

15. It was therefore wrong to dismiss the appellant's claim on the ground that he did not prove that the cows were valued at 47,300/-. Their purchase price was clear and that is the amount the learned magistrate ought to have awarded for the 3 cows. In my view, expert testimony was not required as the price of the cows was indicative of their value. In evaluating the evidence, I did not find any evidence referring to the value of calves or that the cows had given birth and that the calves were in the respondents' possession.

16. In the result, the appeal is allowed. I set aside the judgment dismissing the appellant's claim and substitute it with judgment for the appellant against the respondents for the sum of Kshs. 32,000/-. The sum shall accrue interest from the date of filing suit at court rates until payment in full. As regards costs, I am of the view that each party should bear their own costs both in the subordinate court and in this appeal as they participated in a process in good faith which was ultimately held to contravene the appellant's rights.

17. The final orders are therefore as follows;

- a. The appeal is allowed and judgment be and is hereby entered for the appellant against the respondent for the sum of Kshs. 32,000/- with interest thereon at court rates from the date of filing suit until payment in full.
- b. There shall be no order as to costs both in the subordinate court and in this appeal.

DATED and DELIVERED at MIGORI this 17th day of April 2015.

D.S. MAJANJA

JUDGE

Mr Abisai instructed by Abisai and Company Advocates for the appellant.

Mr Agure for instructed by Agure Odero and Company Advocates for the respondent.