IN THE REPUBLIC OF KENYA

IN TEH HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 172 OF 2011

BERNARD MZIZI ….....APEPLLANT

VERSUS

JOASH LIYAYI..... RESPONDENT

JUDGMENT

1. "..... it is now trite law that special damages must not only be pleaded but must also be specifically proved. We do not think we need to cite any authority for this simple and hackneyed proposition of law…"

> - *Court of Appeal at Nairobi in Civil Appeal No. 180 of 1993 William Kiplangat Maritim & Another versus Benson Omwenga citing with approval its earlier decision in Charles Sande versus Kenya Co-operative Creameries Ltd Civil Appeal No. 154 of 1992 (unreported).*

2. The Appellant herein instituted a civil claim against the Respondent in the surbordinate court at Kakamega being Civil Suit No. 302 of 2010 (hereafter referred to as ***"the suit"***) claiming Kshs. 190,000/= on account of conversion of his seven heads of cattle by the Respondent. He also sought for costs and interest.

3. The basis of the suit was that the Appellant had entrusted the Respondent with the said seven heads of cattle which he intended to take them later on only for the Respondent to unlawfully sell them and despite undertaking to make good the compensation to the Appellant, the Respondent failed to do so hence necessitating the suit.

4. The Respondent denied liability and in a defence filed on 13/09/2010, he put the Appellant to strict proof of all the allegations in the plaint.

5. At the hearing the Appellant testified and called one witness whereas the Respondent testified without calling any witness.

6. By a judgment delivered on 18/11/2011, the learned trial magistrate dismissed the suit on the ground that the claim for Kshs. 190,000/= was not strictly proved or at all. The Respondent was also awarded costs.

7. Being aggrieved by the said finding, the Appellant preferred an appeal in which he challenged the learned trial Magistrate's finding as wanting in law with a calling that the said judgment be set-aside and judgment be entered as prayed for in the plaint.

8. The Appeal was heard by way of written submissions with each party represented by Counsel in a spirited support of its case.

9. As the appeal was the Appellant's first appeal in law, the duty of this Court is settled. It is duty bound to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. This Court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in ***Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278*** *and* ***Kiruga –versus- Kiruga & Another (1988) KLR 348.***

10. In discharging the said duty this court remains guided by the binding judicial pronouncement in the cases cited hereinabove which indeed has all along remained the legal position in respect to proof of special damages or in liquidated claims.

11. I have carefully perused the record in the suit as well as the parties' submissions in the appeal. I have also seen some criminal proceedings in ***Kakamega Chief Magistrate's Criminal Case No. 1515 of 2008*** against the Respondent wherein the Appellant was the complainant in respect to a charge of theft of some cattle where the Respondent was the Appellant's agent.

12. In the said criminal proceedings the trial court examined two crucial issues which were whether the Respondent was the Appellant's agent and whether the Respondent stole a cow and two bulls belonging to the Appellant. The said trial court on receiving evidence from several witnesses including the Appellant's neighbours as well as a finger print officer from the Department of Registration of Persons did not find any basis in the charge and the Respondent was accordingly acquitted. The said criminal proceedings were produced as part of the Appellant's exhibits in the suit. Of importance to the witness from the Registration of Persons was that he attended court to adduce evidence in relation to a document which the Respondent had allegedly affixed his finger impressions with the Respondent's records held by the office to ascertain if indeed the Respondent had truly affixed his marks on the said document. The result was negative.

13. However in the suit, the Appellant brought in an agreement which he alleged that the Respondent had now executed by way of signing as a commitment to make good the return of his cattle. The agreement was dated 29/10/2008 and despite instituting the criminal case in 2010, the Appellant did not make any inference to that alleged agreement but instead produced the one allegedly affixed with finger prints. The signed agreement seems to have surfaced during the pendency of the suit as the proceedings in the criminal case did not refer to it or at all.

14. The Respondent categorically denied taking part in the alleged execution of the said agreement just as he stood firm against the agreement where it was alleged that he affixed his marks. He indeed stated that he was illiterate and could not either read or write. To him the alleged agreement was forged, just like the one in the criminal case and traced his troubles with the Appellant from his refusal to sell him his hand.

15. I have seen the sustained trend by the Appellant to recover *"his cattle"* from the Respondent. From the criminal case in 2008 to the suit in 2010 upto the appeal in 2011. From the document alleged to have been affixed with the Respondent's finger print marks in the criminal case to the Agreement which the Respondent alleged executed in the suit and all the witnesses. The evidence of the witnesses both before the criminal court as well as the suit did not manage to strictly bring out the Appellant's claim both in the criminal case as well as the suit. The Respondent was acquitted in the criminal case and the suit dismissed.

16. There was no evidence in the suit connecting the Respondent to the alleged signed agreement despite the Respondent's remaining categorical clear that he never executed the agreement right from his pleadings. None of the witnesses in the suit ever touched of the alleged crucial agreement.

17. Having considered the judgment in the suit and the entire evidence on record I have no doubt that the

Appellant pleaded his case with precision but failed to prove the claim of Kshs. 190,000/= against the Respondent. The trial court hence arrived at the right finding that the Appellant had failed to prove his case as against the Respondent.

18. The very weak evidence adduced by the Appellant and his only witness in the suit placed side by side with the evidence in the criminal case creates more questions than answers. The trial court was hence right in finding that the agreement which the Respondent was alleged to have signed and on which the Appellant based his claim on did not go into proving the claim as laid by the Appellant to the standard of proof as so required in liquidated claims.

19. I hence find that none of the Appellant's grounds of appeal are holding in law and thereby render the entire appeal without any legal leg to stand on. The appeal is hereby dismissed with costs.

Order accordingly.

DATED and SIGNED at MIGORI this 6th day of November, 2015.

A. C. MRIMA

JUDGE

DATED, COUNTERSIGNED and DELIVERED at KAKAMEGA this 13th day of November, 2015.

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JUDGE