



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CIVIL APPEAL NO. 170 OF 2011**

**BETWEEN**

**LEONARD GITONGA IKINGA ..... APPELLANT**

**AND**

**WILFRED GICHUKI KINGA ..... RESPONDENT**

*(Being an appeal against the judgment and decree in Nanyuki SPM's Court*

*Civil Case No.49 of 2001 delivered by J.N. Nyaga, SPM, on 2nd November 2011)*

**JUDGMENT**

By a plaint dated 10th June 2001 the Respondent sued the Appellant for the sum of Kshs.85,000/= being the value of 34 goats together with costs of the suit.

It was pleaded that at all material times the appellant in his capacity as the elder brother of the respondent had been grazing for and on behalf of the respondent 34 goats with the understanding that he would give them back to the respondent when he needed them and that despite the demand the appellant refused to give the respondent the goats.

By a defence dated 23rd August 2001, the appellant denied having had in his custody any goats belonging to the respondent and further stated that the suit was mischievous, misconceived, frivolous and vexatious.

Based upon the said pleading, the matter proceeded to hearing wherein the respondent PW1 WILFRED GICHUKI KINGA's evidence was that the appellant was his step brother. In 1989 December the respondent had been given 34 goats by his father when he was in form one. It was his evidence that he gave the said goats to the appellant. In 1998 when he completed college and was posted to Mukuguru he went for his goats but the same refused to hand them over to him.

On 27th December 1998 a family meeting was called on the said issue but the appellant refused to attend. It was further the respondent's evidence that on 19th September 1999 the appellant wrote a letter indicating that he knew about the goats and would comply with the decision of the uncles. The respondent further testified that on 5th November 1999 he went to the appellant's farm where his mother gave him 34 goats which he gave to one Maingi but after two weeks the appellant told the said Maingi to return the goats. It was his evidence that on 18th March 2000 they met with the assistant chief.

Under cross examination, the respondent stated that when he gave the goats the appellant was not physically present and that the appellant was not present when the father told the respondent to take the goats to the appellant. He further stated that he raised the issue of the goats after this father's death but the

same was not recorded in the minutes. It was his further evidence that on 19th September 1999 the appellant wrote acknowledging that he had the goats

PW2 Maingi Gitonga testified on oath that both the appellant and the respondent were his nephews. He stated that he did not remember the exact date the goats went to the appellant. He testified that the appellant failed to attend the family meetings called over the goats but that he wrote to him **Exhibit No.3** and the 34 goats were eventually taken to his place but were taken back on the appellant's instruction.

Under cross examination, he stated that the said goats belonged to the respondent's mother and that before the father of the appellant and the respondent died, he had distributed his property. PW3 JOHN WANJOHI GITONGA's evidence was that at the family meeting when dividing the property, the 34 goats were not mentioned because they had already been allocated to the respondent.

The appellant testified on oath and stated that in the last week of November 1989, 126 goats were taken to him by the defendant and brother Daniel Wanjohi, that the respondent said he was under instruction of their father to deliver them. It was his evidence that the goats belong to his father and that he was not told of the rights of the respondent. On 5th January 1990 his mother went to Makuraini and told him that their father had instructed her to settle there and take care of the goats and lived there upto 2007.

It was his evidence that in 1991 when they were sharing their father's property, the respondent was in form one and that when the respondent asked for the goats he referred him to his mother who refused to give him the goats. It was his evidence that the goats were given out to the respondent by his mother and that he was not aware that his brother Christopher Gichuiru Kinga went back for them.

Under cross examination he confirmed that his brother took away the goats from PW2's home and that he had admitted that the respondent had the goats at Makuraini. DW2 Christopher Gichuiru Kinga Ngangino's evidence was that he used to herd his mother's goats until 1996 when he was employed. In 1990 his mother told him that the respondent with the assistance of wazees had taken her 42 goats.

DW2 further testified that he reported to the police who did not offer him assistance so he decided to go for the said goats.

Based upon the said evidence the trial court entered judgment for the respondent and had this to say:-

**“There is no dispute that the defendant's mother gave the plaintiff 34 goats. The defendant did not raise any objection when his mother gave the plaintiff 34 goats. He instead told the elders not to involve him with the issue of the goats as it was his mother who was in charge.”**

Being aggrieved by the said judgment, he filed this appeal and raised the following grounds of appeal:-

*The Honourable Senior Principal Magistrate erred in entering a finding of liability on the part of the appellant even after finding as a fact that the act complained of by the respondent had been committed by a person other than the appellant.*

*The learned Senior Principal Magistrate misdirected himself in concluding that the appellant had a duty to rectify an injury alleged to have been inflicted on the respondent by a person other than the appellant.*

*The learned Senior Principal Magistrate erred in arriving at the conclusion that the appellant had control over the matters complained of by the respondent.*

*The learned senior Principal Magistrate erred in finding that there was any property of the respondent in possession of the appellant or anyone else for that matter.*

*The learned Senior Principal Magistrate erred in finding that the goats claimed by the respondent*

*were identifiable.*

*The learned senior Principal Magistrate erred in failing to find that the respondent's claim was an attempt at extortion.*

*The learned Senior Principal Magistrate erred in arriving at a value of Kshs.85,000/= for the claimed goats without supporting evidence of such value.*

*The judgment was against the weight of evidence.*

## Submissions

Directions were given that the appeal be heard by way of written submissions. On behalf of the appellant it was submitted that it is disputed whether the appellant's deceased mother gave the goats to the respondent voluntarily or unwillingly. It was submitted that having found that DW2 was the culprit in the removal of the goats the appellant should not have been held liable. It was submitted that it was not the responsibility of the appellant to return the said goats to the respondent having been taken by the DW2.

It was further submitted that the evidence tendered was that the disputed goats belonged to the respondent's mother and that the said goats were never established.

On behalf of the respondent, it was submitted that the appellant's defence was not consistent. It was submitted that it was the appellant who had a duty to enjoin DW2 as third party. It was submitted that the trial court did not erre in any way.

## Issues

The following issues have been identified for determination:-

- a. *Whether the respondent proved his case against the appellant on a balance of probability.*
- b. *Whether the appellant was liable in respect of the respondent's claim.*

It is not disputed that this is a family dispute which the elders attempted to arbitrate upon and from the evidence tendered it is clear that the appellant did not co-operate with the elders thereby resulting to the filing of this suit. It was the appellant's evidence that he handed over the goats to his mother in 1992 and therefore for all intend and purposes of the suit herein the appellant's mother was his agent. It was the appellant's evidence that in June 1998 he met the respondent who asked about the goats and he referred him to his mother who according to evidence on record handed over the said goats to the respondent. It is therefore clear that the respondent had established on a balance of probability that he was owed 34 goats by the appellant and therefore find no fault with the trial court's finding thereon.

On the issue of whether the appellant was liable herein, I have stated that his mother was his agent in respect of the said goats, there is a finding of fact by the trial court that the appellant's mother voluntarily gave out the 34 goats to the respondent as a result of the decision of the meeting of the uncles held on 27th December 1998.

I therefore find no merit on the appeal herein which I hereby dismiss with cost to the respondent.

**Signed and dated      day of      2014**

**J. WAKIAGA**

**JUDGE**

Delivered by Justice J. Ngaah on behalf of Justice Wakiaga this 25 th day of November 2014

**J. NGAAH**

**JUDGE.**

In the presence of:-

----- for Appellants

----- for Respondent