



REPUBLIC OF KENYA

High Court at Kisumu

Civil Appeal 17 of 2012

GILBERT OMOLLO.....1ST APPELLANT

GOEGE OUMA OMOLLO.....2ND APPELLANT

V

DOROTHY ADHIAMBO OGUTARESPONDENT

J U D G E M E N T

The appellants were jointly sued by the respondent for having their livestock trespass on the later's land and destroy cotton, sweet potatoes and cassava all worth Kshs.3,800/=. The suit was for general and special damages, costs and interest. The appellants denied that their livestock entered the respondent's land on the alleged date, or at all. They denied that their livestock had damaged any crops belonging to the respondent. Both sides called evidence following which the trial court found for the respondent and awarded general damages of Kshs.10,000/= and general damages in the sum of Kshs.3,800/=. then costs and interest. The appellants were aggrieved by the decision and filed this appeal.

The record shows the respondent's evidence that on 11/9/08 at 2 p.m. she found the cattle belonging to the appellants grazing her cotton and cassava crops growing in her shamba. She called DOMINIC ONGONDO OLOO (PW2) who came to witness the incident. He stated that he came after the destruction and after the animals had left the land. He found the respondent and the 1st appellant discussing the matter. The animals belonged to the 1st appellant. The 1st and 2nd appellants are brothers. When re-examined, PW2 stated that he did not find the 1st appellant here. He only found herdsman. The other witness was JOHN OKWAMA (PW3) who was the village elder. The respondent reported the incident to him and he came to find the damaged crops. He tried to get the parties to negotiate but that effort was not successful. WALTER OCHIENG OGADA (PW4) stated that he was grazing nearby when he saw the 1st appellant's cows enter into the respondent's cotton farm and graze it. He raised alarm and a child came calling the respondent who had not come by the time he left.

The appellants each testified and called a witness P.C. JOSEPHAT OLE NCHARI (DW1) of Pap Onditi Police Station. They denied all the evidence by the respondent and her witnesses.

It is required of this court to reconsider all the evidence and to reach own conclusions on the same, while appreciating that the trial court had the advantage of seeing and hearing the witness.

I have considered the grounds in the Memorandum of Appeal and the submissions by counsel. The respondent's testimony was that she found the cattle of the appellants eating her crops. She called PW2 who said he came after the animals had left the piece of land. He (like PW4) stated that the animals belonged to the 1st appellant. There was certainly material contradiction between the respondent and her witnesses regarding whose cattle grazed her crops. Secondly, the plaintiff alleged that the destroyed crops were cotton, sweet potatoes and cassava. The respondent's evidence was that what was destroyed were cotton and cassava crops. The report rendered by the agricultural officer referred to cotton, sweet potatoes and cassava. There was no effort to reconcile or explain the contradiction.

The defence called DW1 who produced the Occurrence Book of Pap Onditi Police Station which showed that when the respondent reported the incident officers visited the scene and found no crop had been destroyed and sought to have her charged with giving false information. The trial court should have considered DW1's evidence to be independent confirmation of the testimony of the appellants that there was no destruction by their cattle, or at all.

In short, my own evaluation and consideration of the recorded evidence shows that, on balance, the respondent's evidence was not sufficient proof that the animals of the appellants had damaged her crops. The trial court was therefore wrong to find for the respondent. I allow the appeal and set aside the judgement of the lower court. In its place there shall be judgment dismissing the suit with costs. Costs of the appeal will follow the event.

Dated, signed and delivered this 13th day of May 2013

A. O. MUCHELULE

J U D G E