



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 159 OF 2003

(Being an appeal from the Judgment and Decree in Nakuru R.M.C.C. No. 1589 of 1991)

JOSEPH MARUNGA GITONGA.....APPELLANT

VERSUS

THE ADMINISTRATORS OF THE ESTATE
OF RAHAB WANJIRU EVANS (DECEASED).....RESPONDENTS

JUDGMENT

The Appellant sued the late Rahab Wanjiru Evans in Nakuru R.M.C.C. No. 581 of 1992 and claimed special damages as follows -

(a)	Value of the cow	Shs	20,000/=
(b)	Value of the Calf	Shs	15,000/=
(c)	Fees due to the Advocate	Shs	10,000/=
(d)	Travelling expenses in this and Criminal Case No. 1589 of 1991	Shs	200/=
(e)	Costs of court proceedings	Shs	<u>444/=</u>
	Total	Shs	<u>46,644/=</u>

The Appellant also claimed general damages.

In a Judgment delivered on 2nd October 2003, the Appellant's suit was dismissed on the principal ground that a suit based on malicious prosecution, failure to join the Attorney-General on behalf of the Republic (*as prosecutor*) was fatal to the suit.

Aggrieved with the lower court's judgment, the appellant came to this court on appeal on the following grounds -

(1) *that the learned Magistrate erred in law in treating the suit as sounding in tort of malicious prosecution and ignoring the action in the tort of conversion.*

(2) *that the learned magistrate erred in law in holding that the Attorney-General should be joined in a tort of conversion by relying on the evidence adduced in the Criminal Case to defeat the plaintiff's*

suit.

(3) that the learned trial magistrate erred in law in holding that misjoinder of parties could defeat the suit and failing to consider the issue of liability as between the parties on record and in generally misapprehending the facts.

(4) that the learned Magistrate erred in law in failing to consider the submissions by counsel for the plaintiff at all.

(5) that the learned Magistrate erred in law and fact in interpreting the law wrongly and arriving at a judgment not supported by facts.

And prayed that -

(i) the appeal be allowed,

(ii) the judgment in Nakuru CMCC No. 581 of 1992 be set aside,

(iii) judgment in Nakuru CMCC No. 581 of 1992 be entered in favour of the Appellant, and this court do proceed to determine the special and general damages to be awarded to the Appellant,

(iv) the court do award the Appellant any other relief as this court may deem fit;

Mr. Mungai Mbugua learned counsel for the Appellant also filed written submissions citing the cases of **JADIEL NYAGA VS. SILAS MUHERE**, (Civil Appeal No. 59 of 1987), and **Mwanasokoni vs. Kenya Bus Services Ltd [1985] KLR 931**.

Mr. Gai, learned counsel for the Respondent neither filed any written submissions nor attended court on 28.11.2011 when this matter came up for hearing. At the request of counsel for the Appellant, I gave the date of 17.02.2012 for the judgment herein, being therefore this judgment.

The facts giving rise to the claim in this and the lower court are not in dispute and that is probably why the Respondent counsel did not bother to attend court.

The Appellant was charged in Nakuru Criminal Case No. 1589 of 1991 of stealing contrary to Section 275 of the Penal Code, (Cap. 63, Laws of Kenya).

The prosecution claimed that the Appellant during the night of the 11th/12th October 1990, at Eclipse Hotel within Nakuru in Nakuru District of the Rift Valley, jointly with others not before the court stole one Fresian cow valued at Ksh 20,000/= the property of the late RAHAB WANJIRU EVANS.

The appellant was on the evidence found not guilty and was acquitted. The learned trial magistrate also found it to make the following order -

"This Court orders that the cow which is the subject matter of this case and the calf be released to the accused person in this case or their value to be given to the accused by the complainant."

Although the learned trial magistrate did not cite the provisions of the law under which he made the above order, it is clear that the order was under the provisions of Section 177 of the Criminal Procedure Code, (Cap. 75, Laws of Kenya). The **Head Note** to that Section and to Sections 178 which follow it says - **RESTITUTION OF PROPERTY**, and it says -

"S. 177. Where, upon the apprehension of a person charged with an offence, any property is taken from him the court before which he is charged may order -

(a) that the property be or a part thereof be restored to the person who appears to the court to be entitled thereto, and, if he be the person charged, that it be restored to him or to such other

person as he may direct, or

(b) that the property or a part thereof be applied to the payment of any fine or any costs on compensation directed to be paid by the person charged.

In this matter the trial magistrate in the criminal case found in his judgment that both the cow and its calf belonged to the Appellant, and that the Police (*the prosecution*) had no authority to hand over the cow and the calf to the late Rahab Wanjiru Evans, as there was no evidence to show that the said cow and calf were her property. The learned trial magistrate found on the sworn evidence of the Appellant that the distinctive marks, on the legs, ears, and dehorned head, were made by the Appellant and observations from the growth of fur (*hair*) on the parts marked, showed that they were made when the cow was young and not after the 11th/12th October 1991 when the Respondent's 4 cows were stolen.

Having myself reviewed and evaluated the evidence before the lower court in the criminal case which was tendered as part of the evidence in the civil case, the subject of this appeal, I would agree with and confirm the findings of the learned trial magistrate, that the Appellant was the ostensible owner of the cow and calf, and was entitled to the recovery thereof, or the value of said cow and calf.

In this regard neither the case of **JEDIEL NYAGA VS. SILAS MUCHEKE** (*supra*) nor **Mwanasokoni vs. Kenya Bus Ltd** (*supra*) are of any help to the appellant. In the former case, the Court of Appeal dismissed Mr. Nyaga's appeal on the grounds that the Respondent was not responsible for either his arrest or prosecution. That was an act of the Police. The latter case is only useful to the extent of restating the principle that an appellate court has the power to examine and re-evaluate the evidence on a first appeal where that becomes necessary.

The appellant's case is not based on malicious prosecution, and that is why the Attorney-General was not enjoined in his suit, the subject of these appeal proceedings. The basis of the Appellant's suit is the tort of conversion. According to William Gildart, **AN INTRODUCTION TO ENGLISH LAW**, 143 D.C.M. Yardley ed. 9th Edn. 1984 -

"By conversion of goods is meant any act in relation to goods which amounts to an exercise of dominion over them, inconsistent with the owner's right of property. It does not include acts of mere damage or even an asportation which does not amount to a denial of the owner's right of property; but it does include such acts as taking possession, refusing to give up on demand, disposing of the goods to a third person, or destroying them."

In this case the Police committed an act of conversion by the wrongful delivery to the Respondent of the Appellant's cow and calf when all the evidence showed that the cow belonged to the Appellant. The Respondent committed the act of conversion by detention of the Appellant's cow and calf without any colour of right. The evidence showed that some 4 cows had been stolen or lost by the Respondent. There was no evidence that the Respondent had lost a cow and a calf. The conversion of the Appellant's cow and calf was a serious and unjustifiable denial of his title and called for immediate restitution as the learned trial magistrate had ordered after the trial in the criminal case.

Section 177 of the Criminal Procedure Code calls for either restitution of the goods to the rightful owner or the fair value thereof.

So far as my inquiries were able to establish the current market value for a cow or heifer in calf is not less than shs 120,000/= a calf would be about Shs 60,000/=, totaling Kshs 180,000/=.

In the circumstances therefore, I would set aside the judgment of the lower court dismissing the appellant's suit. I award the Appellant the value of the cow and calf in the said sum.

I would not award the Appellant any special or general damages against the Respondent. The Respondent made a complaint to the Police, and the Police failed to carry out proper investigations which led to the appellant's acquittal, on the evidence. The Appellant cannot say his prosecution was malicious in the

sense that there was no reasonable and probable cause for the Respondent to instigate investigations through the Police. The Respondent had lost her 4 cows. The Appellant was suspected to have bought the cows. There was no evidence to prove this charge or the charge of handling stolen property hence his acquittal. It cannot be said that the Respondent was actuated by malice in making a report to the Police.

In the event, I decline to make an order for damages.

In summary therefore the appeal succeeds partly, I decline to make any order for special or general damages. I however award the Appellant the value of his cow and calf. I also award him interest on the sum of Ksh 180,000/= and costs in this, and the lower court.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 17th day of February, 2012

M. J. ANYARA EMUKULE
JUDGE