



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 157 OF 2009

MUKUZI JOHA MAKENZI.....APPELLANT

VERSUS

MWADZUYA MTSUNGA CHIGUTA.....PLAINTIFF

(Being an appeal from the Judgment of Resident Magistrate Mr. Andayi in Civil Case No. 26 of 2005 at Kaloleni Law Courts)

JUDGMENT

The respondent sued the appellant in the lower court for compensation of Kshs 70,000 in respect of 12 herds of cattle that he stated were stolen by the appellant. After trial before the Senior Resident Magistrate Kaloleni judgment was entered for the respondent for Kshs 60,000 but the court declined to award the respondent Kshs 10,000 in respect of special damages.

The court found that the special damages were not proved. The appellant was aggrieved by that judgment and has filed this appeal. This is the first appellant court. That being so, my duty is to re-evaluate the evidence, analyse it, and come to my own conclusion but in so doing, I must give allowance to the fact that I neither saw, nor heard the witnesses. See the case of **SELLE v ASSOCIATED MOTOR BOAT COMP. [1968] E.A 123**. The respondent in evidence before the lower court stated that on the night between 4th and 5th July, 1999 five of his cows were stolen from the shed at 2.00am. Although he searched for them he was not able to recover them. He informed the court that he suspected the respondent to have stolen them because the respondent had stolen his cattle before. That was in 1997 when again at 2.00 a.m his cattle were not at his shed. At that hour the respondent woke him up and told him to go and check for his cattle. On getting up he found that five of his cattle were missing. He together with the appellant followed the hoof marks which led them to the village elder's compound. At the village elder's compound they found the respondent's bull.

At this incident of 1997, the respondent stated that the appellant had with him a panga, a stick, a torch and a rope. Even though the appellant had come to him, at that incident of 1997, to tell him that his cows were missing the respondent told the lower court that he did not ask the appellant how he had known that his cows were missing. They left the cow at the village elder's compound and followed the other hoof marks which led them towards the appellant's compound. The cattle were near the appellant's compound.

The respondent said that on that occasion the appellant told him that the bull had ran away because he had tried to hold it and tether it but he was unable.

According to the respondent in respect of that incident of 1997, he was of the view that the appellant's

intentions were to steal the bull but it ran into the village elder's compound. Although the appellant requested the respondent to go and take an "oath" so that he could know who had taken his cattle he decided otherwise because he had recovered his cattle.

It is on the basis of that incident of **1997** that the respondent informed the court that when his cattle were stolen in **1999** he suspected the appellant. On that suspicion he reported the matter to the chief. The chief requested the two of them to go to him with two witnesses each. The respondent went with two of his witnesses whilst the appellant went with his wife, sister in law and his daughter. The appellant was told that it was not in order for him to bring those witnesses and as a result he called an elder to be his witness. When that was done, they were referred by the chief to the councilor called **Boniface Kalongo**.

The councilor was to arbitrate over the matter. The respondent informed the councilor that he knew it was the appellant who had stolen his cows. The appellant confessed to that fact. As a result of that confession an agreement was prepared. By that agreement the appellant agreed to pay the respondent Ksh. 60,000 by 15th August, 2000. That agreement was produced in evidence.

The appellant according to the evidence of the respondent failed to make payment on the day they had agreed. The respondent reported the matter to the District Officer who summoned both of them. The appellant informed the District Officer that he had failed to pay because he was unable. The District Officer referred them to Kaloleni Police Station. When they went to the Police Station, they were requested to go to the court, presumably to file a civil matter. As they were going the appellant according to the respondent escaped.

The respondent said that each cow was valued at Ksh. 12,000 making a total of Ksh. 60,000. The costs that he incurred on respect of the arbitration were ksh.10,000. He therefore prayed for judgment.

One of the respondent's witnesses during the arbitration gave evidence as PW2. He said that a month after the respondent lost his cattle, in 1999, the respondent requested him to attend a meeting at the councilor Kalongo's home. When he went there he found the respondent and the appellant. He noted that the appellant was in the company of his wife and sister in law. He confirmed that he was a witness for the respondent at that meeting.

At the meeting the respondent asked the appellant to compensate him for the cows. The appellant denied he had taken them. As a result the councilor said that the matter would then have to be reported to the police since there was no likelihood of a solution. The appellant according to this witness said that he did not want to go to the Police Station but wanted the matter to be resolved. The appellant then agreed to compensate the respondent for the missing cows and to pay his expenses of Ksh. 20,000. This witness then said as follows in respect of the appellant:

"He then called me aside together with his wife and younger brother's wife. While the four of us, (sic) he said he was agreeable to refunding the cows. They were five cows. They had been six the day they got lost. However, the plaintiff (respondent) managed to get the carcass of one that had been slaughtered and he carried it home."

During that meeting this witness also said that the appellant again called him aside and requested him to negotiate the respondent's expenses because they were high. This witness said that he could not do that but promised to ask the respondent. As they were aside the wife of the appellant said: ***"....even if the plaintiff declined, he (appellant) should just pay to avoid imprisonment."***

When they rejoined the other people at the meeting, this witness requested the respondent to reduce the expenses which he agreed to do and reduced it to Kshs. 10,000. It was then that the agreement was drawn and the respondent and the appellant signed and this witness signed giving his identity card number. The agreement according to this witness was prepared by councilor **Kalongo**.

What is pertinent about the evidence of PW2 is that the appellant did not cross examine him about his evidence that he signed the agreement. He also did not cross examine him on his evidence that he called him aside asking him to negotiate the expenses claimed by the respondent. It would therefore follow that the appellant accepted that evidence as being correct.

The appellant in his defence stated that this case began at the councilor's home. That the councilor had gone to his home the day before the meeting in the company of seven people and it was on that day that the councilor invited him to a meeting at his (appellant's) home. It was there that the respondent accused him of stealing his five cows. The appellant at that meeting denied and challenged the respondent to avail witnesses who saw him steal the cows. He said that the respondent did not have such witnesses and at that meeting the councilor told the respondent to arrange for his arrest for the theft of those cows.

On the day of the meeting the appellant said that he had gone to the councilor's home at 6.00am. It was when he was there that the councilor kept calling him aside and was requesting him for a bribe so that he could resolve the matter. He declined. At 4.00pm whilst they were still at the councilor's home, he stated that he wished to go to his home. There were then thirty people in the councilor's compound. When he said he wanted to go to his home, the crowd of people attacked him and in the course of the fracas his identity card fell down. The people picked it up and gave it to the councilor who wrote the details from it into the agreement. He ended his testimony in chief by saying that he did not steal the respondent's cows. On being cross examined, he stated: ***"I never agreed that I took the cattle. I did not sign that (sic) voluntarily. My identity card was forcefully taken from me."***

It would be noted that the evidence given by the appellant in his defence was not put in cross examination of the respondent and his witness.

The appellant called his wife as a witness. She stated that she recalled on the **7th July, 2000**, that is a day before the agreement was signed, her husband told her that he would be attending a meeting regarding an issue of cows. On the evening of that day, she stated that the councilor went to their home in the company of the respondent and took the appellant behind the house. Because she was fearful she followed them. She heard the councilor asking her husband for money in order for him to resolve the matter. The appellant told the councilor that he had nothing to do with the issue. It was then that the councilor asked the appellant to go to his home for the meeting. The appellant went to the councilor's home immediately after breakfast. This witness went later and found a crowd at the home of the councilor. These people were pleading with the appellant to agree to compensate the respondent ***'or else they take him (sic) to a place he (sic) would die there.'*** Later in the evening she said she saw the respondent with others in a struggle with the appellant. They got the appellant's identity card. This upset this witness and she left the compound.

On being cross examined she denied that the appellant agreed to enter into an agreement. Indeed this witness said: ***"I never saw any agreement. I never saw it."***

As stated before the learned trial magistrate gave judgment for the respondent. This was after having benefited from seeing and observing the parties and their witnesses. The learned trial magistrate analysed the evidence that was presented before him. The consideration of that evidence was so extensive that it left no room of complaint by either party. I am of the view that I can do no better than extensively reproduce some of it in this judgment as follows:

"I have carefully considered the evidence by the plaintiff and the defendant. The point for determination is whether the plaintiff (respondent) has proved on a balance of probabilities that the defendant(appellant) trespassed upon his goods and converted them to his own use by theft of the cows.

On the issue of the demeanour of the witnesses there is hardly one that can be said to be better than the others. The plaintiff relies on two issues. First that a similar theft of his cows had occurred at his

home and interestingly, the defendant was the one who alerted him over it in the middle of the night. This evidence by the plaintiff was not challenged by the defendant in cross-examination or in his defence. It was more suspicion, even at that time but the fact that it happened that way leads to the conclusion that the plaintiff had good reason to suspect the defendant on the second occasion. The plaintiff's second piece of evidence is the agreement he produced in court in which the accused acknowledged that he stole the cows and agreed to refund them by payment of money. The defendant does not deny that he made that agreement. Therefore, his wife denial that she ever (sic) saw any such agreement is not honest. There is another material discrepancy in the evidence of the defendant and his witness. Whereas he said that the councilor called him aside to ask him to give him some money to resolve the matter at the meeting the wife says this was previous day at their home. The defendant does not mention that there was any such incident at their home while the wife does not say this happened at the meeting at he councilor's home. That discrepancy was not resolved. Considering that this was a husband and wife, I am inclined to believe that the defendant's wife gave evidence she felt was favourable to the husband. That is why she says there was no agreement when in fact there was one.

The defendant's position is that he was convinced into signing the agreement. But what he said was that his identity card fell and was collected. But besides his identification card number appearing on the agreement, his signature is thumb print and is also appended. He has not told the court how he was forced to dip his finger in the ink and put it on the paper. The evidence by the plaintiff and PW2 is that he voluntarily did so. PW2 appeared to me particularly honest and straightforward person. I believe that what he said was true. The defendant initially denied that he stole the cows but on being told that the matter would be taken to the police station, he agreed to its resolution there. The resolution was by way of his admission that he stole the cows and that he would repay for them. I therefore find that the defendant voluntarily signed the agreement. In light thereof and on the evidence of the plaintiff and PW2, I am satisfied that the defendant did admit that he stole the plaintiff five cows and agreed to refund them."

There is no basis in my view laid before me why I should differ with the finding of the learned trial magistrate. There is no error that I can find either of fact or law as enumerated in the memorandum of appeal. The learned counsel for the appellant faulted the judgment on the basis that it failed to consider that the agreement which was exhibited before court was obtained by force as against the appellant.

The learned trial magistrate in respect of that agreement found it difficult to understand how the appellant was forced to dip his finger in ink and to stamp his thump on the agreement. Indeed that was an issue not addressed by the appellant in his evidence. In his evidence he stated that his identify card was forcibly taken from him and the number of it was appended on the agreement.

It is material to note that, that aspect of the evidence was not subjected to cross examination when the respondent was cross examined. The learned Magistrate who saw the witnesses give evidence, believed the testimony of PW2. PW2 gave evidence that the appellant, on calling him aside to negotiate for him the respondent's costs, thereafter signed the agreement. Indeed the appellant did confirm that he signed the agreement and that being so, he is bound by the terms of it.

The appellant throughout the conduct of the lower court case did not state why the respondent and/or the councilor wished to frame him for the theft of the respondent's cows. For that matter why the crowd of people allegedly attacked him. He did not say that there existed a grudge between him and the respondent and accordingly his claim that he was attacked by a group of people and his identity card taken from him is far fetched. It is material to note that the respondent did not cross examine the respondent about the incident the respondent narrated which he said occurred in 1997. That evidence was very damning.

I fully agree with the consistencies noted by the trial magistrate. There is no reason why this court should set aside the trial court's judgment. In the end, this appeal has no merit and is dismissed with costs to the

respondent. That being so, the stay of execution granted in SRM Kaloleni Civil Case No. 26 of 2005 on **17th November, 2009** is hereby vacated.

JUDGMENT BY:

MARY KASANGO
JUDGE

DATED and DELIVERED at MOMBASA this 1st day of December, 2011.

R. MWONGO
JUDGE