



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**Civil Case 122 of 2002**

**GULLID MOHAMED ABADI ..... PLAINTIFF**

**VERSUS**

**O.C.P.D. ISIOLO POLICE STATION**

**ISIUKO DISTRICT COMMISSIONER**

**ATTORNEY GENERAL ..... DEFENDANT**

**J U D G M E N T**

Gullid Mohamed Abdi, a pastoralist from Isiolo in North Eastern Kenya, filed this suit on 5/7/2002. He sought a declaration against the defendants, jointly and severally, to the effect that the defendants were grossly negligent in failing to provide necessary security for him to enable him recover his livestock which had been stolen from his Manyatta at Maili Tano Isiolo on or about 4/5/2000. He also sought general damages as well special damages in form of as full compensation for the livestock stolen. He finally sought costs and interests at court rates.

The facts behind the suit as I understand them are that the plaintiff owned several livestock on 5/7/2000 consisting of 250 cattle, 50 camels, 10 donkeys and 1200 he goats. In the morning of 4/5/2000 at about 5.30 a.m., all the above stock were stolen during an attack by Boran raiders. The plaintiff managed to trace the place where the livestock were driven to. He then, early the next morning, when daylight came, reported to Isiolo Police Station which was 10 kms away, giving details of the area where he believed the cattle being hidden. It is the plaintiff's case that the police officers who were on duty and who received his report, refused to act. They did not even record the report in the Occurrence Book of the day. They instead, according to the plaintiff, demanded some money which perceived to be a bribe. He said he did not have much to part with but finally gave out Kshs.1000/= which indeed persuaded them to enter the report in the Occurrence Book. Thereafter however, no further action to follow up on the case was taken. That is when he decided to see the Officer Commanding the Isiolo Police Station over the issue. He explained to him that he saw where the animals were hidden and if he was given police officers to follow up, he would lead them there as he was confident that recovery would be made.

It is plaintiff's further evidence that the O.C.P.D refused or declined to help him giving the reason that the station did not have adequate number of police officers. The plaintiff did not give up. He instead went and reported his predicament to the District Commissioner Mr John Chege at his office at Isiolo and insisted that he needed help. Plaintiff however further testified that the District Commissioner instead ordered him out of his office. He thereafter travelled all the way and reported to the Provincial Police Officer at the Eastern Province Headquarters at Embu, a town far from Isiolo. The Provincial Police Officer apparently did much better. He listened to the case and thought it deserved some official action. He accordingly wrote a letter to his O.C.P.D at Isiolo, the latter being his junior officer. When the

plaintiff returned to Isiolo and handed over the letter to Isiolo OCPD, repeating his earlier request for help to recover his stolen livestock, the OCPD once more refused to help using the earlier excuse that he did not have enough officers whom he would assign to the case.

It is plaintiff's further evidence that he did not still give up. So he travelled back to Embu but this time to see the Provincial Commissioner. The latter listened to the story told by the plaintiff carefully. He then telephoned the District Commissioner, Isiolo and instructed him to give the plaintiff police officers to go and assist him recover the animals. In addition the Provincial Commissioner gave the plaintiff a letter to the District Commissioner, Isiolo. The plaintiff took a photocopy of the note (exh. 1). It stated that the plaintiff who had lost his animals needed assistance and that the District Commissioner should give him a hearing.

When the plaintiff once more saw the District Commissioner, Isiolo, the latter had turned hostile. He reprimanded the plaintiff for allegedly accusing him before the Provincial Commissioner. He even told the plaintiff that the P.C. could as well go and recover the animals. He chased the plaintiff away without assisting him. This time the plaintiff who was still determined to get help, decided to see Deputy Commissioner of the General Service Unit at Nairobi, Ruaraka. The latter instructed the Provincial Police Commissioner to reach the local camp of G.S.U. at Maua in Meru District for assistance. He was sent back to Embu Provincial Police Officer who in turn sent him once again to Isiolo O.C.P.D. The latter discussed the case with the same District Commissioner, Isiolo and the two decided that they could not give out any Police Officers on the ground that if they did so and an officer got injuries, they would be held responsible. And so the plaintiff had finally nowhere to turn to for help.

In his evidence the plaintiff produced a notice dated 19.6.03 given to him by the Isiolo Police Station announcing the theft of his 250 cattle, 10 donkeys, 1200 sheep/goats and 50 camels. It is exhibit 2. He also produced (exhibit 3) the Isiolo District Livestock Marketing Officer's valuation of the above animals, which indicates the valuation as follows:

150 cattle at Kshs. 30,000/= each = 7,500,000/=

1200 goats/sheep at 3,000/= each = 3,600,000/=

50 camels at 25,000/= each = 1,250,000/=

10 donkeys at 10,000/= each = 100,000/=

**12,450,000/=**

The plaintiff also produced a demand letter dated 31/5/2002 directed to the Attorney-General of Kenya by the plaintiff's advocates, Mithiga, Kaberia & Mbae Mwarania which was copied to plaintiff – exhibit 4. He finally also produced a letter written by the Attorney-General to Commissioner of Police, explaining the plaintiff's intention to file this suit and seeking a response from the Commissioner of Police – exhibit 5. The letter indicates that the Attorney General had 30 days to respond from 24/6/02 which he states would start to run from the date of service of the plaintiff's notice. The plaintiff also produced a certified copy of a ruling of this court granting him leave to file this suit outside the prescribed time – exhibit 6. The time was enlarged under Meru High Court, Civil Application No. 79 of 2002 by Kasanga Mulwa J on 18/6/2002.

The plaintiff was cross-examined by the State Counsel Mr Njogu on behalf of the Attorney-General. He repeated the evidence he had given in his evidence in chief. He confirmed that he had no alternative but to pay Kshs. 1,000/= to the police who demanded money to record his theft report in the Occurrence Book of which exhibit 2 is an extract. It confirmed the report to be Occurrence Book of 4/5/2000. He also explained the reason for filing this suit late and out of time to be the delay caused by the police and other Government officials in dealing with his claim and failure to raise money to do anything else including the filing of this case after losing all his property.

The plaintiff called one witness, PW2, Mohamed Ali. The latter said he was a herdsman like the plaintiff and lived in the same area with plaintiff. He confirmed that the plaintiff indeed lost his livestock in evidence to thieves on 4/5/2000 at 5.30 a.m. He said that he used to herd plaintiff's animals and was in the manyatta the morning the raid took place. He escaped to Isiolo Town. That the plaintiff reported the incident to the police in Isiolo but got no help from the Government. He confirmed the actual animals and the numbers thereof that got stolen. He also confirmed that 25 people were killed during the particular raid.

In response to the plaintiff's evidence after cross-examination the plaintiff and his witness, Mr Njogu, the State Counsel, decided not to call any evidence in rebuttal.

Each side filed a written submission and requested the court to write its judgment on the written submission filed and served on each other before 26/7/2005.

In the submissions filed, Mr Mithega for the plaintiff said that plaintiff had in a night raid lost the livestock mentioned in his plaint and evidence, and whose value he claimed, the plaintiff had proved on the balance of probability, particularly since his evidence was not controverted or rebutted by the defendants. He argued that the state, through the police, had a statutory duty of care to help the plaintiff recover his stolen animals since he saw and therefore knew where they would be recovered from. Mr Mithega submitted that the police had flatly refused and/or neglected that duty to plaintiff's detriment. He pointed to his various and consistent efforts to remind the police to do their duty and to their totally negligent and/or reckless conduct which culminated in their total refusal to follow up the raided animals, as a result of which the plaintiff completely lost the animals. He accordingly submitted that the plaintiff was entitled to compensation from the defendants jointly and severally to the extent of the proved value of the animals which he gave at Kshs.12,450,000/=. Mr Mithega also believed that the plaintiff was entitled to court costs and interests at court rates.

On his part Mr Njogu for the defendants submitted that the plaintiff's evidence had failed to prove the case on the balance of probabilities. He also in particular raised the following legal defences:

- a) That the plaintiff's suit offended Section 13A(2) of Cap 40 – the Government Proceedings Act in that the plaintiff had in the Notice of Intended Prosecution, failed to give the proper identities of the officers whose conduct gave rise to the suit by failing to specifically giving their actual names.
- b) That this suit is time-barred under Public Authorities Limitation Act, Cap 39 and that the reason given for failing to file the suit does not entitle him the right to file the suit out of time.
- c) That the suit offended Section 13A of the Government Proceedings Act, aforementioned in giving a Notice of Intention to sue of less than 30 days as provided therein (that he gave 12 days).

Relying on the above arguments the defendants sought dismissal of this suit, with costs.

I have carefully considered the evidence on the record and the arguments raised by both sides. I have also carefully perused Section 13A and Section 13A (2) (c) of the Government Proceedings Act, Cap 40 of the Laws of Kenya. I wish to first dispose of the issues based on the Government Proceedings Act aforementioned.

Section 13A provides that no proceedings against the Government shall lie or be instituted until after the expiry of a period of 30 days after a notice in writing has been served on the Government in relation to those proceeding. Mr Njogu for the Attorney-General appeared to argue that the related notice served upon the Attorney-General did not fulfill this requirement. He called no evidence on this issue. On the other hand the plaintiff's evidence was that this suit was filed after a period of 30 days after service of the notice. The notice itself is clearly dated 31/5/02, a period of 35 days before the suit was first filed and well within the 30 days required. In the absence of any evidence from the defendants to controvert or rebut the plaintiff's position, I find no reason not to accept and believe plaintiff's evidence as true. The defendants' objection to the notice is therefore rejected.

Section 13A (2) (c) of the Act, which provides about Notice to be served, states that Notice shall be in the form set out in the 3<sup>rd</sup> schedule and shall include (c) the name of the Government Department alleged to be responsible and the full name of any servant or agent whom it is intended to join as a defendant. The court understood the defendants to be saying that the plaintiff's notice of intended prosecution did not give the names of the police officers or the District Commissioner who refused or failed to assist him.

I have read the said notice. It clearly states that the servants of the Government who failed or neglected to assist him to recover his stolen livestock were the police and the District Commissioner, Isiolo. The notice has not indeed given out the actual names of the Government servants involved. However, in my opinion the plaintiff has named the rank of the Police Officer Administrative Officer who whose conduct led to his detriment. That appears to me to be adequate identification upon which the Attorney-General would easily set necessary investigations.. Indeed by his letter dated 4/7/2002 to the Police Commissioner, the Attorney-General does not appear to have been inconvenienced or confused over the identification of the officers to be investigated on the matter. He clearly warns the Police Commissioner that the plaintiff intends to sue the Police Department. If the plaintiff's identification of the relevant were inadequate the Attorney-General would seek clarification as to which department of the Government was due to be sued. The defendants' objection in respect to this point does not therefore hold much water. In my opinion the requirement under the relevant Section was intended to force the intending plaintiffs to supply sufficient information to enable the Attorney-General to seek instructions from the relevant departments and servants. Parliament could not have intended that the Section should be used to technically bar parties who otherwise are entitled to seek redress in our courts of law against the offending officers of the Government.

Thirdly, the defendants objected to this suit validity on the ground that it was time-barred under Public Authorities Limitation Act, Cap 39. In the alternative they argued that time enlargement given to the plaintiff to file this suit was given under the provision of Limitation of Actions Act Cap 22 of the Laws of Kenya. Mr Njogu led no evidence to prove any of the above allegations which he raised for the first time in his written submissions. He could have sought leave to orally argue the issue when the suit was mentioned to give parties opportunity to orally add to their written submissions, if they had anything to add, but he did not. On the other hand, the plaintiff had produced the certified order which was granted by Kasanga Mulwa, J., which had enlarged time but which the defendants did not object to or question. Under these circumstances this court felt entitled to presume that the court order enlarging time was properly obtained and was lawful. It was upon the defendants to challenge the validity or the merit of the grounds of enlargement of time, during the hearing of the suit. That was not done. It is the view of this court, accordingly, that this objection also, has no merit and is rejected.

The major issue that should now be considered is whether the plaintiff proved his case on the balance of probability is so far as the facts are concerned, and secondly whether the law backs him adequately to enable him to get orders of compensation against the defendants, as prayed.

The facts of the case have already been stated at the beginning of this judgment. The plaintiff's animals were stolen apparently by Boran raiders in the morning of 4/5/2002. He reported to the police at Isiolo Police Station within two hours of the theft and sought police help because he had information of the area where the livestock would be found. The police officer's on duty at Isiolo Police Station refused to record the occurrence for several hours demanding some inducement. The plaintiff's finally released kshs.1,000/= to them as that is all he could afford and upon receipt of the money the police recorded the report and released to him an original abstract. He saw the O.C.S and the O.C.P.D of the station who both turned his request for help, down. He visited the District Commissioner, Isiolo who threw him out of his office after also refusing to help. The plaintiff then went to the Provincial Headquarters at Embu where he saw the Provincial Police Officer. The latter was sympathetic and gave the plaintiff a note to take to O.C.P.D, Isiolo who once again refused or failed to act on the ground that he had no manpower. Plaintiff once more returned to Embu Provincial Headquarters where he, this time, saw the Provincial Commissioner. The latter instructed the Isiolo District Commissioner to help the plaintiff. When the plaintiff saw the D.C. with P.C's letter the latter accused him of going to accuse him (the D.C.) before his boss. He declined to help. This time the plaintiff went to Nairobi where he saw the Deputy Commissioner of the General Service Unit, Ruaraka. He was once more sent to see PPO, Embu, who

sent him to OCPD, Isiolo. The O.C.P.D and the D.C Isiolo discussed the issue on phone and decided they would follow the animals. That ended the plaintiff's attempt to recover his animals. He finally came into terms with his loss of the animals and started to seek for alternative relief.

These facts in his evidence were not really controverted or rebutted by the defendants who adduced no evidence. I have considered the same. I am satisfied on the balance of probability that they are true. I accept and believe that the police at Isiolo, in particular the O.C.P.D and the D.C, totally refused to supply police officers to accompany the plaintiff to recover his livestock. This was despite the fact that the Provincial Commissioner and Provincial Police Officer, Embu who were their superiors, instructed the two officers to assist the plaintiff. The several occasions that the plaintiff had to see the two Government Officers, confirms plaintiff's patience and determination to recover his livestock. In my further view, the several occasions the District Commissioner and OCPD, Isiolo had to turn the plaintiff down and away without help, confirms their deliberate decision not to help him. It confirms alternatively, that they did not care whether he lost the animals or not. There is no evidence on the record, as the defendants did not adduce any, that Isiolo Police Stations did not have adequate police officers who could have been instructed to accompany the plaintiff. Indeed, that was not advanced as the defendants' defence. The reasonable conclusion commending itself to this court from the above facts, is that the OCPD and DC Isiolo refused and/or neglected and/or did not care whether or not the plaintiff irretrievably lost his animals.

The case the plaintiff advanced is that he lost the animals and thereby the value of the animals because the defendants refused or neglected to him to recover them. He said that he knew where the animals were hidden and believed the same could have been recovered if the police had decided to follow them. And so he argued that the police and the administration, had a statutory duty of care to him to help him recover the animals but that they breached such duty, leading to the loss that he incurred. The plaintiff also averred that the OCPD's and D.C's conduct amounted to gross negligence of such a duty and that this court should declare so and declare them liable to make the loss good. This raises the issue as to whether the Police Department and/or the Provincial Administration, have an obligation or a duty to protect every citizen's individual property in circumstances that if such property were stolen as plaintiff's animals were stolen, the government would be held liable to pay compensation.

I have no doubt in my mind that under Section 75 of the constitution every citizen of this country and those others, who claim similar protection, have a right to own property. They are all guaranteed protection from unlawful deprivation of such property. Neither a private individual nor the government would be entitled to deprive any other person of his property without being required to give back in return, adequate compensation.

However, in a case such as this where unknown individuals, unlawfully at night, raided the plaintiff's manyatta or animal sleeping ground and stole the animals, how would the government be linked? The raiders did not inform the government or anyone of their evil and unlawful intention. The Government could not therefore have knowledge of it before hand to enable it put mechanisms in place to prevent or stop the deprivation of the plaintiff's -property.

Furthermore, how would the Government, whether through the Provincial Administration or the Police Force, be able or be expected to guard every home in Kenya, to prevent raids and thefts planned by those who are evil and who constantly plan to deprive others of their property?

In my view, in general terms, the Government cannot literally be expected to reasonably be able and capable of preventing unlawful thefts occurring in private homes every time. Section 75 of the Constitution must have been intended to be read in such a way as to mean and to be limited to breaches committed by the Government against private individuals or known private individuals who can be pursued for compensation in civil suits such as this. However, the above statement can be taken as a general view until Section 14 (1) of the Police Act Cap 84, is introduced. It states:

**“The force shall be employed in Kenya for the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, the apprehension**

**of offenders, and the enforcement of laws and regulations with which it is charged.”**

The above provision states the duties of the Police Force in Kenya. They include the prevention and detection of crime and the apprehension of offenders. The Police Force is also to protect life and property. If is asked, “which crime is to be prevented and be detected?” An appropriate answer would be, that any crime committed within the Republic is targeted under the above law provision. That means that the Police Force has a duty to prevent or detect crimes as well as preserve life and property and apprehend possible offenders. The property and life to be protected must be the life and property of the Kenyan citizens including that of the Government and of those who at any given time, claim the protection of the Kenyan law. Otherwise there is no other life or property in Kenya that the above law provision would be referring to except those found and living in Kenya.

The main issue that arises under these circumstances is whether the duty above mentioned obligated upon the police force to carry out, creates a direct enforceable duty in favour of the citizens of Kenya. Put differently, can a citizen walk to the next police station and say:-

“You have a duty to protect my life and property but you were not there and available to do so last night when thieves came and stole my property,” and then proceed to court to file a compensation claim?

In my view, such a claim would in practice, be too remote under Section 14 (1) of the Police Act aforementioned. As earlier stated there is no way presently the Police Force can be able to protect each and every Kenya citizen’s home from theft or unlawful raids by thieves despite the fact that the said Section 14 (1) above appears to be so providing. Indeed the duties of the Police Force under the section appear mandatory in that the Force shall be employed for the prevention and detection of crime, and the apprehension of offenders, among other duties. However, a careful consideration of the section would show that what it does is to merely declare a general duty of care to the people of Kenya. This leads me to say that the state through the Police Force, owes a general duty to those who lawfully live in Kenya, so as to preserve peace, to protect their lives and property, and to provide security by preventing and detecting crime, and where crime has been committed, to apprehend the offenders.

It is my further view, however that the general passive duty has to be converted to an active specific duty relating to a specific individual before the same can be considered as a legal relationship a breach of which can result into a legal consequence such as damages. In other words, the conduct of both the state and the individual citizen to each other, while within the broader duty of care created under Section 14 (1) aforementioned, must be activated in such a way that it produces an actionable relationship. Put differently, the duty of care owed by the state to the individual citizen, a breach of which can be actionable, does not solely depend on what is broadly stated in Section 14 (1) of the Police Act Cap 84 of the Laws of Kenya. In my view, it may be the nature of conduct of the individual citizen who wishes to invoke his rights under the said provision and the response of the Police Force that may determine whether the said section goes to citizen’s aid or not.

The broad outline of the state’s duty as I understand it is therefore as follows:-

That the state under Section 70 of the Constitution and more specifically under Section 14 (1) of the police Force Act aforementioned, is to protect the citizen and citizen’s property, provide security and maintain peace. While on the face of it such duty appears absolute and unqualified, yet in practice it may depend and be based on many and various factors.

Put broadly, a plaintiff, in common law, establishes the defendant’s breach of duty and how he (the plaintiff) has suffered a loss as a result of such breach. The plaintiff thereby makes a prima facie case and the defendant would only escape liability in respect to the loss if he proved that the alleged act or default on the part of the plaintiff, caused or contributed to that loss, in which case the defendant would be exonerated altogether or be partly liable. Lord Diplock, LJ. observed as much in Boyle v Kodak (1969) 1 KLR, 655-666.

Under the common law as well, the duty to provide security and maintain peace and order vested with the

crown. This duty reposed in the state in exchange of loyalty and allegiance from the subjects. It is probable that the same principle applied to Kenya through the general application clauses apart from the fact that it was coded under the above mentioned Section 14 (1) of the Police Act. That the breach of such duty can be owed to and be enforceable by an ascertainable class and even a member of public through a civil court action, was discussed and approved in Phillips vs Britannia Hygienic Laundry Co. (1923) 2 KB, 831 and in Monks vs Warbey (1935) 1 KB, 75 and in the case of Solomon vs R Gertzensten & others, (1954) 2 QB, 243.

It can therefore be safely stated that in Kenya the legal duty of maintaining law and order and of preserving public security and peace is vested in the Government. The power to institute and undertake criminal proceedings against any person in respect of any offence alleged to have been committed in relation thereto, rests with the Attorney-General under Section 26 of the Constitution. He may require the Commissioner of Police to investigate any such matter which, in his opinion, relates to any such offence or alleged offence or suspected offence. The Attorney-General has power to delegate this authority. The Commissioner of Police and the whole Police Force, on the other hand, have independent powers under the Police Act for the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and protection of crime, the apprehension of offenders, and the enforcement of all laws and regulations with which they are charged.

The High Court in a Mombasa case Roshanali Karmali Khimji Pradhan vs Attorney-General Civil Case No. 276 of 1998, was faced with a similar issue such as is facing this court in this suit. The plaintiff owned a farm called Ziwani Farm. He received reports from his workers on the farm that some youths, armed with bows and arrows were trespassing on the farm. Plaintiff reported to various government security and administrative agents including, the Chief, the D.O., the Police, the Police Commissioner and the Attorney-General from whom he sought security and protection. Almost without exception, the said security agents refused or ignored the plaintiff's pleas. Ultimately the plaintiff's farm was attacked by youths and heavy damage caused to plaintiff's properties. He filed a civil claim alleging failure on the part of the government in its duty to protect him as provided under the Constitution, Statute and common law in exchange for his loyalty and allegiance to the government. The facts that no action was taken by security agents to protect the plaintiff was proved. None of the government agents in question appeared in court to rebut the plaintiff's facts. In his evidence the plaintiff in said case testified that he had not expected to be given a police guard to protect his farm over 24 hours of the day always. But he expected that the police were under legal obligation to take steps to prevent the youths in the neighbourhood and on the farm from time to time, from causing the damage they eventually caused particularly during the period immediately after he sought protection. Plaintiff relied inter alia, on Section 14 (1) of the Police Act, aforementioned. He expected the police to investigate his reports to the security agents, make arrests where necessary and thus forestall the ultimate attack on his farm.

The court found that the Defendant was guilty of constitutional and statutory duty to protect the plaintiff's rights as well as guilty of negligence in failing to act quickly to control the situation. The court also found that the government owed the plaintiff a direct duty as an individual and also owed the public at large a similar duty. The court found the Government liable for breach of duty and awarded special damages which had been tabulated in the plaint and which the court was satisfied were proved. The court found no room to award general damages. In all an award of Kshs. 17,930,180/= special damages was awarded.

Turning to the case before me, the plaintiff's case is that soon after his animals were forcefully taken away, he reported to the police at Isiolo Police Station, informing them the direction and area the animals were driven towards and indicating where they were likely to be hidden, for which reason he sought police help. The request for help and how it was totally refused by the police, even after the provincial Commissioner and the Provincial Police Officer had intervened, has already been tabulated. The plaintiff's facts and evidence, were not challenged or rebutted. They were accordingly accepted by this court as true and accordingly proved on the balance of probability. The only questions that remain to be answered therefore are:-

(a) whether the defendant owed the plaintiff a legal duty of care

(b) whether the defendant breached that duty and

(c) whether the defendants are liable on damages to the plaintiff.

Taking into account the facts of this case and the law which the court has considered above, I hold that the defendants owed the plaintiff a duty under the constitution and under Section 14 (1) of the Police Act aforementioned. It was the Police Force's duty to apprehend those who raided plaintiff's manyatta and forcefully stole his domestic animals. The police had a reasonable obligation to follow the raiders with the guidance of the plaintiff who at all material time offered to do so. Had they done so the police would most likely have recovered the stolen animals and have maintained law and order, protected plaintiff's property and detected crime.

In refusing and/or failing to hearken to the plaintiff requests to follow and recover his animals, the Police Force in my view and finding, breached the legal duty of care it owed the plaintiff as an individual. By reporting to the Force when he did and demanding assistance, the plaintiff in my finding, brought himself within the scope, of duty of care of the duty owed to him under Section 14 (1) of the Police Act. It was thus, the report and the request for help that activated the plaintiff's rights under the relevant law and not the mere existence of the imposed duty of care in the Police Act.

The final issue is whether the plaintiff is entitled to damages and if so, the type and quantum of the same. I understand the plaintiff's case to be that due to the negligence and/or recklessness of the defendant arising from their refusal to assist the plaintiff, the plaintiff irretrievably lost all the animals which were stolen during the material night. The loss of the animals clearly amounted to the loss of their value. The damages due to the plaintiff should therefore be the fair and proved value of the plaintiff's lost animals.

The plaintiff, in his plaint, pleaded the actual animals stolen and their value according to his valuation. His amended plaint averred that he lost:-

1. Head of cattle 250 @ 30,000 7,500,000
2. Head of camels 50 @ 25,000 1,250,000
3. Head of donkeys 10 @ 10,000 100,000
4. Head of he goats 1200 @ 3,000 3,600,000

Total value **12,450,000**

I have carefully considered the evidence adduced by the plaintiff to prove what should clearly be classified as special damages I am satisfied that there was adequate evidence to prove that he held and kept the kind of animals pleaded that he owned during the relevant night. I am also satisfied that he proved on the balance of probability, that they were stolen as per the numbers and manner shown in evidence besides the fact that the defendant did not challenge the plaintiff's clear evidence.

I am however, not satisfied with the general valuation of the cattle and goats. I will on my part find that the value of one head of cattle should be Kshs.20,000/= instead of Kshs.30,000/= and one head of he goat should be Kshs.2,000/= instead of Kshs.3,000/=. The result would accordingly be as follows:

- |                       |         |        |                  |
|-----------------------|---------|--------|------------------|
| 250 head of cattle    | @ Kshs. | 20,000 | 5,000,000        |
| 50 head of camels     | @ Kshs. | 25,000 | 1,250,000        |
| 10 head of donkeys    | @ Kshs. | 10,000 | 100,000          |
| 1200 head of he goats | @ Kshs. | 2,000  | <u>2,400,000</u> |

**8,750,000**

It follows that the plaintiff's claim succeeds to the extent of Kenya Shillings, Eight Million, Seven Hundred and Fifty Thousand only (8,750,000/= ) which I hereby award as special damages, with costs and interests. I hold on the other hand, that there was no evidence to prove any general damages, which claim head is hereby dismissed. Orders accordingly.

Dated and delivered at Machakos this 27<sup>th</sup> day of November 2006.

**D.A. ONYANCHA**

**JUDGE**