REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 294 OF 1997

PATRICK NGANGA KAMWENA …….APPELLANT

VERSUS

EDWARD NGANGA MUCHERU…….RESPONDENT

JUDGMENT

On 27th April, 1995 the appellant alleged he had gone to his shamba to cut fodder for his cattle when the respondent's 6 days came there and attacked him.

That though the appellant fought off the dogs with his panga one of them bit him on the left buttock and he suffered injuries.

He filed a suit in the court of the Senior Resident Magistrate at Kikuyu on 4th July 1995 to claim both special and general damages from the respondent for the injuries he had sustained. A defence filed in the court on 24th August 1995 denied all the allegations stated in the plaint save for the description of the parties. The case was heard by the lower court on 30th November 1995, 11th April 1996, 16th May 1996, 26/9/1996, 6th February 1997, 12th June 1997 and 17th July 1997 when parties testified and submissions were made. Judgment was delivered on 2nd October 1997 when the suit was dismissed with costs.

The appellant thought this judgment unfair and he lodged this appeal in court on 31st October 1997 through a memorandum which listed two (2) grounds of appeal, namely that the magistrate erred in law and infact when he held that the plaintiff had not proved his case against the defendant on a balance of probabilities, and that he erred in holding that the plaintiff did not prove that the dogs belonged to the defendant while evidence that they indeed belonged to him was overwhelming.

This court heard the appeal on 29th January 2003 when counsel for parties submitted thereon.

Counsel for the appellant stated that it was wrong for the lower court to find that the appellant had not proved his case on a balance of probabilities, in particular that the dogs did not belong to the defendant when there was overwhelming evidence to prove this.

In order for counsel to reinforce this submission, he pointed out that as an immediate neighbour of the respondent, the appellant knew the dogs and had seen them in the respondent's homestead when he visited it.

That the appellant's evidence and that of his 2 witnesses PW2 and PW4 tallied on this and in particular PW4 who had earlier been bitten by one of the dogs.

According to counsel the most important evidence was that about the black dog which had bitten the appellant and which he had properly identified and described.

That the magistrate had placed a higher standard of proof upon the appellant than is required, otherwise there was no dispute that the appellant had suffered injuries as a result of the dog bite. That evidence was adduced to show that the dogs were known to be fierce and yet the respondent did not confine them, hence he was guilty of negligence.

Counsel prayed that this appeal be allowed with costs.

Counsel for the respondent stated that there was no proof that the respondent owned the said dogs or that he was negligent. According to him, the evidence of the appellant and that of PW3 and PW4 did not tally as to what transpired at the scene of the incident or thereafter.

That the fact that the dogs ran to the respondent's compound did not mean they were owned by him, particularly when that compound had the respondent's house and those of his sons. He prayed that the appeal be dismissed with costs.

The most important evidence in the case subject to this appeal was that of ownership of the dogs which allegedly bit the appellant. How many dogs they were, their colour, whether one or 2 were cut was not important.

The only evidence the appellant adduced to identify the respondent with the dogs was that they all ran to the latter's compound after "harassing" him; or that the respondent has been seeing them there.

But it was not a secret throughout the hearing of the case in the lower court that there is bad blood between the two parties as there have been previous disputes between them, one after another, arbitrated upon by either the area chief, assistant chief or clan elders.

And though the appellant stated that he has visited the respondent's home and seen the dogs there the respondent said the two never visit each other due to the feuds between them.

Even if they did, it was agreed in evidence that the respondent lives in his compound with his grown-up sons and that it was difficult to pin him down with the ownership of the dogs and not his sons.

One might say the respondent should, at least, have called his sons to say if the dogs were theirs or not but there is no burden placed upon a defendant in a civil suit like the one subject to this appeal to prove anything.

This burden remains on the plaintiff throughout and that burden is to prove the suit on a balance of probabilities.

In the case subject to this appeal, regrettably, the appellant failed to prove on a balance of probabilities that the dogs which bit him were owned or belonged to the respondent and the magistrate was perfectly correct when she decided the case infavour of the respondent on this point.

This appeal is dismissed with costs.

Delivered this 20th day of February, 2003.

D.K.S. AGANYANYA

JUDGE