



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CIVIL APPEAL NO. 70 OF 2017

SAMWEL GISIRI MAGESI.....APPELLANT

-VERSUS-

1. THE HON. ATTORNEY GENERAL

2 TABITHA MURUGA.....RESPONDENTS

(Being an appeal from the judgment and decree by Hon.R. Odenyo

Senior Principal Magistrate in Migori Chief Magistrate's

Civil Suit No. 43 of 2013 delivered on 31/05/2017)

JUDGMENT

1. Following the seizure of **Samwel Gisiri Magesi's** one head of cattle by the then Assistant Chief for Ngeitara Sub-Location in Maeta Location one **Tabitha Murugu**, the second Respondent herein, on 10/05/2012, the said Samwel Gisiri Magesi, the Appellant herein, filed **Migori Senior Principal Magistrates Civil Suit No. 43 of 2013** (hereinafter referred to as '**the suit**') through **Messrs. Abisai & Company Advocates** against the Respondents herein claiming return of the head of cattle or the value thereof of Kshs. 40,000/=, damages for unlawful conversion, costs and interests at Court rate.

2. The suit was defended. The First Respondent, the Hon. Attorney General, entered appearance and filed a Statement of Defence together with a List of Documents and a List of Witnesses. The second Respondent entered appearance through **Messrs. Kerario Marwa & Company Advocates** and filed a Statement of Defence. The Appellant testified as **PW1** and called two witnesses namely **Isaac Maroa Peter (PW2)** and **Daniel Nyangoga Gichiri (PW3)**. At the hearing, Litigation Counsel **Miss Winnie Ochwal** appeared for both Respondents where the Second Respondent herein testified as **DW1**, the Area Chief for Tabesi Location one **Mwita Peter Bosaga** testified as **DW2** and one **Kigocha Jomo Matugu** testified as **DW3**.

3. At the close of the respective cases the parties filed their submissions and by a judgment rendered on 31/05/2017 (hereinafter referred to as '**the impugned judgment**'), the suit was dismissed with costs.

4. Aggrieved by the decision the Appellant preferred the appeal subject of this judgment. He filed a Memorandum of Appeal on 30/06/2017 and raised the following eight grounds challenging the impugned judgment: -

1. The Honourable trial Magistrate erred in law and fact by dismissing the Appellant's case notwithstanding the fact that the 2nd Respondent admitted having unlawfully compensated a third party using the Appellant's head of cattle.

2. The Honourable trial Magistrate erred in law by dismissing the Appellants claims with costs despite having ruled that the Respondent's exhibit documents were fake, false and factious.

3. The learned trial Magistrate erred by holding that the award he made was a justification of the Appellant having obstructed the 2nd Respondent from search of stolen animals, an issue that was not proved to the required standards.

4. The learned trial Magistrate erred in law and fact by endorsing a system of 'law' which is unconstitutional, contrary to the bill of rights and hence unjust.

5. *The learned trial Magistrate erred in law and fact by holding that the 2nd Respondent was justified in her action because she was promoting peace at the expense of the Appellant's private property.*

6. *The learned trial Magistrate erred in law by holding that the seizure of the Appellant's head of cattle was not unlawfully seized.*

7. *The learned trial Magistrate erred in his holding contrary to the weight of evidence.*

8. *The learned trial Magistrate erred in law and fact by ordering the Appellant to pay costs of the case.*

5. The Appellant prayed that the appeal be allowed and the impugned judgment be set-aside and instead judgement be entered in favour of the Appellant against the Respondents jointly and severally for Kshs. 40,000/= together with general damages.

6. Directions were taken, and the appeal was disposed of by way of written submissions where the Appellant duly complied, but the Respondents did not. The Appellant submitted that the trial court erred in dismissing the suit despite overwhelming evidence in support. That, the court wrongly analyzed the evidence and shifted the burden of proof. The Appellant submitted that the tort of conversion was proved and that the Appellant was entitled to damages. He relied on several decisions for that proposition.

7. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348**).

8. I have certainly perused and understood the contents of the pleadings, proceedings, the impugned judgment, grounds of appeal, submissions and the decisions referred to by the parties. In this appeal I will endeavor to ascertain whether the suit was proved and if so whether the Appellant had any remedies in law.

9. As a starting point, it is important to note that the Second Respondent admitted that she took away the head of cattle belonging to the Appellant on instructions of the then **Kegonga District Commissioner** (hereinafter referred to as '**the DC**') and that the head of cattle was not returned to the Appellant. The Second Respondent further admitted that the head of cattle she took from the Appellant was not the one allegedly stolen, but a replacement done in the spirit of compensation. She further admitted that in doing so the DC was not acting on the strength of any Court Order and that the Appellant was never charged with any stock theft. DW3 confirmed that on 04/05/2012 her cow was stolen and later the DC compensated her with the head of cattle belonging to the Appellant. DW3 admitted that indeed the replacement head of cattle was not her cow that got lost.

10. The aforesaid were a culmination of a process undertaken by and under the direction of the DC when DW3 reported the theft of her cow. DW3 testified that on 04/05/2012 at around midnight she noted that her cow was missing and raised alarm. That, people gathered and followed the hoofmarks. DW2 joined the people searching for the lost cow (hereinafter referred to as '**the search party**') which comprised of over 30 people. That, the hoofmarks took the search party past Nyabasi Location and traversed Nyabasi West and Maeta Sub-Locations. In both Sub-Locations DW2 called and informed the respective Assistant Chief of the happenings. That, the hoofmarks led the search party to the home of the Appellant. However, the Appellant refused the search party into his home alleging that every time there was stock theft he was suspected as the thief and yet he had also lost his cows before and no recovery and compensatory efforts were made.

11. DW2 called DW1 who went to the home of the Appellant and upon consulting the DC the search party was directed to go back to the DC and they obliged albeit reluctantly. The matter was then referred to the Peace Committee and a meeting was held on 10/01/2012 where it was resolved that since the Appellant had failed to co-operate with the search party then one of his head of cattle be taken away to the DC's office as compensation to DW3. It was on the basis of the said resolution that the DC called and directed DW1, in the company of two Administration Police Officers, to avail the Appellant's head of cattle which direction was fully executed. The DC then handed over the Appellant's head of cattle to the DW3 hence the Appellant's claim. For clarity purposes the Appellant hailed from DW1's area of jurisdiction and DW1 was married to the Appellant's brother.

12. That was the background upon which the suit rested. Public administration involves *inter alia* devising ways and means upon which members of public co-exist in peaceful environment and their security guaranteed. Given its magnitude, the duty involves several organs of the Government and private sectors. In this case, in order to fight the rampant stock theft cases within Kuria region of Migori County the Government came up with several initiatives including the Peace Committee. Peace Committees were established at various levels and their main mandate were to foster peace among the residents in cases of stock theft and generally. The Peace Committee members would on receipt of a stock theft complaint immediately organize a search party and follow the stocks' hoofmarks. In the event the hoofmarks ended in a homestead then whether the animals were recovered from that home or not the members of that home were ordered to compensate the ones who lost their stocks. According to DW1 the Peace Committees had greatly reduced cases of stock theft in the area. The Peace Committees were under the general control of the District Commissioner's (also known as the Deputy County Commissioners) at the District/Sub-County levels.

13. There is no doubt that the Peace Committee initiatives were intended to do good to the communities. However, like any other initiative undertaken in the discharge of a public duty, **Article 2(2)** of the **Constitution** calls for any such person exercising State authority to fully comply with the **Constitution**. **Article 3(1)** of the **Constitution** further obligates every person to respect, uphold and defend the **Constitution** whereas **Article 10** of the **Constitution** creates National Values and Principles of Governance which bind all State organs, State Officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions. For avoidance of doubt, I must restate the position that even the operations of the Peace Committees must always be undertaken within the confines of the **Constitution**.

14. **Article 40** of the **Constitution** provides for the protection of the right to property. The said provision states as follows: -

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-

a) of any description; and

b) in any part of Kenya

(2) Parliament shall not enact a law that permits the State or any person-

a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation -

a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

b) is for a public purposes or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that

i) requires prompt payment in full, of just compensation to the person; and

ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

15. As aforesaid, the Appellant's lawful ownership of the head of cattle which was taken away is not contested. Therefore, as the owner of the head of cattle, the **Constitution** protected the Appellant's right to that head of cattle under *inter alia* **Article 40**. The Appellant could hence be deprived of his head of cattle within the provisions of the **Constitution** or any law not inconsistent with the **Constitution**.

16. The Appellant contended that he was deprived of his head of cattle in contravention of the **Constitution** and the **Criminal Procedure Code, Cap. 75** of the Laws of Kenya. He further contended that as a suspected stock thief he was not charged in any Court of law neither did he appear before any forum to defend himself. He submitted that the decision of the Peace Committee which was implemented by the DC lacked any legality as it was taken unilaterally and the Respondents committed the tort of conversion on his head of cattle.

17. As a suspected stock thief, the Appellant was entitled to a fair hearing either before a Court of law or the Peace Committee. **Article 50(1)** of the Constitution states as follows: -

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

18. As the proceedings were before the Peace Committee the Appellant was further entitled to a fair trial which entailed the various rights stated in **Article 50(2)** of the **Constitution** which include: -

(a) to be presumed innocent until the contrary is proved;

(b) to be informed of the charge, with sufficient detail to answer it;

(c) to have adequate time and facilities to prepare a defence;

(d) to a public trial before a court established under this Constitution;

(e) to have the trial begin and conclude without unreasonable delay;

(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;

(g) to choose, and be represented by, an advocate and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(i) to remain silent, and not to testify during the proceedings;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

(k) to adduce and challenge evidence;

(l) to refuse to give self-incriminating evidence;

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial.

19. I have seen the Minutes of the Peace Committee referred to by DW1 which were produced as one of the Defence Exhibits. Although the Minutes are not for a Peace Committee but a Stakeholders Security Meeting nevertheless the name of the Appellant is not among those who attended. The Appellant therefore did not participate in the said meeting and there was no evidence that he was invited but declined attendance. If the said Minutes are anything to go by as suggested by DW1 then they support the Appellant's case. Therefore, the Appellant was not accorded any hearing and that in itself was an infringement of his right to a fair trial. The Appellant was hence deprived of his property without being heard and so in contravention of the **Constitution** and the law.

20. Having so found, it follows that the decision to take away the Appellant's head of cattle and instead compensate DW3 cannot stand. Indeed, the tort of conversion was proved.

21. I have also carefully perused the judgment of the trial court which rightly stated that the Peace Committee proceedings were one way of alternative forms of dispute resolution. However, the point of departure is that the proceedings did not accord the Appellant a fair hearing. I also find that since the constitutionality of the Peace Committees as a traditional dispute resolution mechanism was not one of the issues for determination then the finding that the Committees were in line with **Article 159(3)** of the **Constitution** was too ambitious, if at all the trial court had the jurisdiction to render such a declaration.

22. The Respondents did not prefer any appeal or file any Cross-Appeal against the impugned judgment. The Respondents therefore agreed with the trial court's finding that the head of cattle was worth Kshs. 40,000/= and as such I find no basis to disturb that finding. On the issue of general damages for the tort of conversion, the Appellant contended that he was unlawfully denied the use of the head of cattle hence entitled to damages. Having found that the tort of conversion was committed indeed the Appellant was entitled to general damages. The parties did not make propositions on the damages, but the Appellant stated that he used the head of cattle to plough among other duties. I note that the head of cattle would for sure be used in ploughing and for procreation. I find that a modest award of Kshs. 100,000/= on general damages would suffice.

23. There was also the issue of the culpability of the Second Respondent who was an Assistant Chief executing the directions of the DC, her superior. The transaction that culminated with the taking away of the head of cattle involved several people including other Assistant Chiefs, police officers and members of the Peace Committee. The Second Respondent only led the two police officers who had been sent to her by the DC to the home of the Appellant. That in itself does not make the Second Respondent take personal responsibility in the matter. What of the members of the Committee who passed the resolution? What of the DC who executed the resolution of the Committee? I find that the Second Respondent was wrongly enjoined as a party in the suit and is hereby struck out of the proceedings. I will hence enter judgment only against the First Respondent herein.

24. I therefore make the following final orders herein: -

(a) The appeal is allowed and the finding of the trial court dismissing the suit be and is hereby set-aside.

(b) Judgment is hereby entered for the Appellant herein, Samwel Gisiri Magesi, against the Honourable Attorney General for Kshs. 40,000/= being the value of the head of cattle and Kshs. 100,000/= as general damages for conversion.

(c) The sum of Kshs. 40,000/= shall attract interest at Court rates from filing of the suit whereas the figure of Kshs. 100,000/= shall attract interest from the date of judgment in the suit.

(d) The Appellant shall also have costs of the suit as well as of the appeal.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 7th day of May 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open court and in the presence of: -

Mr. Abisai Counsel instructed by the firm of Messrs. Abisai & Co. Advocates for the Appellant.

Miss Opiyo Learned Litigation Counsel instructed by the Honourable Attorney General for the Respondents.

Evelyne Nyauke – Court Assistant