REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO 61 OF 2017

JONATHAN MANGERE……..…….APPELLANT

VERSUS

FRIDAH CHEBET……..……..RESPONDENT

(Being an appeal from the Ruling of Hon. R.M. Oanda, Senior Resident Magistrate delivered in Kisii on 20th day of October, 2017 in Kilgoris Civil Case No. 33 of 2016)

JUDGMENT

1. **Fridah Chebet**, the Respondent herein, filed a suit before the Principal Magistrates Court at Kilgoris in PMCC No. 33 of 2016. The respondent and the appellant have adjacent plots within Ololchani Sub-location where they both grow sugarcane and supply the same to Transmara Sugar Cane Company Limited. It was the Respondent's claim that the Appellant instructed his workers, agents, employees and/or servants to clear his sugarcane farm and that while engaged in the task of clearing the appellant's plot they lit a fire to burn the piled sugarcane foliage on the appellant's farm. The respondent claims that the appellant workers, agents, employees and/or servants were unable to contain the fire and as a result the fire spread on to the respondent's plot and burnt the respondent's sugarcane thereby suffering loss. The respondent claimed Kshs 285,750/- for the loss of crop and Kshs 5,000/- towards the demand notice, costs and interest at court rates.

2. The appellant filed their statement of defence and denied the Respondent's claim and stated in the alternative that if the respondent sugarcane was burnt then the same was instigated by the respondent to facilitate a quick harvest and payment from Trans-Mara Sugar Company Limited.

3. The trial court in its judgment found that the respondent had proved her case on a balance of probabilities and granted the respondent the orders sought. The appellant being dissatisfied with the judgment of the trial court filed a memorandum of appeal on the following grounds;

> *1. That the Learned Trial Magistrate erred in fact and in law in finding ad holding that the Respondent herein had proved her case on a balance of probabilities and thus deserving of a judgment in her favor, when the allegations contained and/or alluded to in the Respondent's pleadings, were not proved, whatsoever.*
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> *2. The Learned Trial Magistrate erred in law in finding and holding that the appellant herein was culpable and/or responsible for causation of (sic) the burning of the suit property, when the alleged activity occurred while the Appellant was away in a meeting. Consequently, the Appellant herein was not responsible and/or substantially responsible for the occurrence.*
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> *3. In finding and holding that the Appellant herein was responsible for the damages allegedly suffered by the Respondent, the Learned Trial Magistrate proceeded to and applied a No-fault scheme, whereby the victim (read Respondent) is entitled to compensation even in the absence of fault on the part of the appellant, in this case, the Appellant. Consequently the judgment rendered in favour of the Respondent is coloured with errors in law and hence the same is vitiated.*
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> *4. The Learned Trial Magistrate erred in fact and law in failing to properly or at all, analyze, evaluate and consider, the totality of evidence, adduced by the Appellant. Consequently, the Trial Court arrived at a passionate and biased conclusion contrary to the evidence on record.*
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> *5. The Learned Trial Magistrate failed to properly evaluate and/or analyze the tenor and effect of the submissions and authorities tendered by and/or on behalf of the appellant. Consequently, the Learned Trial Magistrate misapprehended the crux of the legal issues attendant to the matter before the court.*
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> *6. The Judgment of the Learned Trial Magistrate is contrary to the provisions of Order 21 Rule 4 of the Civil Procedure Rules, 2010. In the premises, the judgment is deficient and fatally defective.*

4. This court has been called upon to make determination on the questions of fact and law, given that this is a first appeal. As the first

appellate court I am required to reconsider the evidence, evaluate it and draw its own conclusions making an allowance for the fact that it neither heard nor saw the witnesses testify (see ***Selle v Associated Motor Boat Company Ltd [1968] E.A. 123, 126***)

5. **Fridah Chebet** (Pw1), **Jeremiah Ruto** (Pw2) and **David Mungai** (Pw3) testified for the Respondent while **Jonathan Mangare** gave evidence for the appellant.

6. Pw1 testified that on the material day she was a kilometer away in the company of Pw3 when Pw3 got a call with information that the farm was burning. They went back to the farm L.R Transmara/ Ololchani/790 and found the appellant's workers putting off fire. As they got closer the workers ran away and sought the help of her workers to put off the fire. 3.4 acres of the farm had burned down. This was 1pm. She met the defendant on the way to the factory who apologized for the fire and accompanied her to the company with a view of requesting the company to harvest the cane. The company harvested 180 tonnes of sugar and was paid Kshs 254,774.25. She further testified that she suffered loss of Kshs 285,750/= after being surcharged Kshs 108,492/- and explained that she would have received Kshs 177,250/- from the portion of the farm that was burnt. She also sought to be paid Kshs 5,000/- incurred on account of a demand notice. On cross-examination she stated that she was not in the farm when the fire started but testified that she saw 4 male employees of the appellant ran away.

7. Pw2 testified that he works with the Ministry in Shankoi Ward Transmara. That on 13th November 2015 they received a report on burnt sugarcane in Ololochani area. On 15th November 2015 they visited the farm to assess the extent of damage and found that there was damage on 3.4 acres. The farm was capable of producing 238 tonnes of cane based on the portion that had not burnt. He testified that the damages area would have yielded 57.18 tonnes and at the rate of Kshs 3100 per tonnes the amount lost was Kshs 177,257/-.

8. Pw3 testified that on the material day they passed through the appellant's land and saw people working on the appellant's land. Later he got a call from a patrol watchman that a portion of the appellant's land was on fire and they returned back to the farm. They met the appellant and together went to the company to request that the sugar be harvested.

9. Dw1 testified that on the material day he was in a meeting and received a call from Pw3 informing him that that the respondent's cane was burnt and that his workers were responsible. He testified that the allegation was not true as he was on the material day solving a boundary dispute in his capacity as an assistant chief and that none of his workers were at his farm on that day.

10. At the hearing of the appeal Mr. Begi counsel for the appellant submitted that the evidence adduced by the respondent was insufficient. He argued that by the time Pw2, the agricultural officer, visited the farm both the burnt and un-burnt cane had been harvested. That it was also not proved that the land belonged to the respondent as the lease for the land was not produced. He also submitted that the respondent gave clear testimony that he had no worker on the farm on the material day and that the maker of statement of account dated 12th November 2015 from Trans-Mara Sugar Company Ltd was not called to testify on the veracity of the document contrary to the **Evidence Act Cap. 80 of the Laws of Kenya.**

11. The appeal was opposed by the Respondent. Mr. Otieno counsel for the Respondent submitted that the evidence by the respondent before the trial court overwhelmingly proved that the Respondent suffered loss. He argued that there was evidence by the appellant that he shared a common boundary with the Respondent. He submitted that there was evidence Pw1 and Pw2 who witnessed the incident. He argued that since the fire was caused by the appellant's workers then he is variously liable. The appellant occasioned the loss and he is liable for the loss. He explained that burnt sugarcane has a lesser value than the un-burnt cane.

12. The main issue for consideration is whether the respondent proved that the appellant was negligent. It is not in dispute that the respondent suffered loss and damage due to a fire. Pw1 and Pw3 who were the first to go to the scene saw the farm burning. Pw1 testified that the appellant's workers were trying to put out the fire but the workers ran away upon seeing her. In the report by Pw2 he indicates that the fire was caused by known people to the respondent. Although Pw1 and Pw2 did not know the name of the appellant's employees who were working on the material day they testified that they recognized them as they had seen them on the defendant's land before. While I appreciate that the Respondent's testimony that she saw the appellant's employees trying to put off the fire she did not call a direct witness who saw the fire spread from the appellant's farm into the Respondent's farm. There was no indication from Pw1 and Pw3 that the fire was from the appellant's farm. When Pw1 and Pw3 arrived only her farm was burning. The respondent in her plaint particularised the particulars of negligence as follows:

a) Instructing his workers to clear and burn sugarcane foliage waste without putting adequate measures to contain and regulate the fire spread.

b) Clearing the sugarcane farm using fire contrary to the directions given by the Transmara Sugar Company Limited.

c) Burning the sugarcane foliage waste in a haphazard manner and starting fire near the Plaintiff's farm will be inevitable.

d) Burning the Plaintiff's mature cane thereby occasioning loss.

e) Running away upon the plaintiff's farm catching fire rather than fighting and containing the fire.

f) Using old and outdated methodology to clear his sugarcane farm without regard to the safety of the neighboring farms.

13. It is trite law that he who alleges must prove. **Section 107(1)** of the **Evidence Act, Cap 80 Laws of Kenya** provides that *whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.* In ***CMC Aviation Ltd. vs. Cruisair Ltd. (No. 1) [1978] KLR 103; [1976-80] 1 KLR 835****, Madan, J (as he then was) expressed himself as hereunder:*

> ***"Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of "evidence" as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth." [Emphasis Added]***

14. Other than the respondent's pleadings there was no evidence that the fire was caused by burning of foliage at the appellant's farm. The patrol watchman who was a key witness and present when the fire started was not called to give evidence to shed light on what caused the fire. I find that the trial court erred in finding that Pw2 was present at the scene when the appellant's workers lit the fire that spread onto the respondent's farm as Pw2 gave clear testimony that he visited the farm on 15th November 2015 after the fire incident to assess damage. After considering the evidence as a whole I am persuaded that the respondent failed to establish on a balance of probability that the fire was caused by the Appellant.

15. I find that the appeal is merited and proceed to set aside the trial court Judgment dated the 28th June 2017. The Respondent failed to prove his case on a balance of probabilities. The appellant is awarded costs of this appeal.

Dated, signed and delivered at Kisii this 5th day of November 2019.

R. E. OUGO

JUDGE

In the presence;

Mr. Begi For the Appellant

Mr. Otieno h/b Mr. O.M. Otieno For the Respondent

Ms. Rael Court clerk