



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL APPEAL NO. 115 OF 2018**

**JOSEPHAT SHIKOLI.....APPELLANT**

**VERSUS**

**SIMON ANDAI SHADRACK.....RESPONDENT**

*(from the judgment and decree of F. Nyakundi, RM, in Mumias PMC Civil Case No. 73 of 2014 dated 31/7/2018)*

**JUDGMENT**

1. The respondent had sued the appellant at the lower court claiming a sum of Ksh. 105,000/= being damages to the respondent after the cattle of the appellant damaged the cane belonging to the respondent. The appellant had filed a defence denying the claim. The trial court found that the case was proved and entered judgment for the respondent to the sum claimed and costs of the suit.

2. The appellant was dissatisfied with the verdict of the trial court and filed the instant appeal. The grounds of appeal are that:-

*(a) The learned trial magistrate erred in fact and law in deciding the case in favour of the respondent when the respondent had not proved his case on the required standards.*

*(b) The learned trial magistrate erred in fact and law in failing to properly analyze the evidence on record thereby arriving at a wrong and unjust decision.*

*(c) The learned trial magistrate erred in fact and law in holding that a claim for compensation had been proven against the appellant.*

*(d) The learned trial magistrate erred in fact and law in failing to have regard to material contradictions disclosed in the plaintiff/respondent's case.*

*(e) The learned trial magistrate erred in fact and law in failing to consider the evidence and submission of the appellant and thereby arriving at an unjust decision.*

*(f) The learned trial magistrate erred in fact and law in making a finding that the appellant was liable to the respondent in the sum of Ksh. 105,000/= when there was no sufficient corroborating evidence to support this finding.*

3. The respondent testified that he had sold a parcel of land to the appellant. That on some several occasions the cattle of the respondent entered into his sugarcane farm and destroyed his cane. The cane was contracted to Mumias Sugar Company Limited. He reported to a village elder but he did not get any assistance. He took an agricultural officer to his farm on 21/3/2012 to assess the damage. The agricultural officer found the appellant's cattle grazing on the land. The agricultural officer assessed the damage at Ksh. 105,000/=. His advocate wrote a demand letter P. Ex. 3 to the appellant but he did not respond. He sued. During the hearing the agricultural officer's report was marked PMFI.1 but the agricultural officer did not turn up in court to produce the report as exhibit.

4. The appellant/defendant did not call any evidence in the case.

5. In his judgment, the learned trial magistrate held that:-

***“The plaintiff produced the title deed to show that the land Bukaya/1569 is registered in his name and the agricultural report indicating the loss. He also produced the outgrowers documents from Mumias indicated the loss. The defence never submitted nor did he call any defence witness.”***

6. The magistrate further held that failure by the defence to call any witnesses and submit on the same meant that the evidence and the submissions by the plaintiff were not challenged.

7. In this appeal the advocate for the appellant, **Mr. Matete Mwelese**, submitted that the agricultural officer's report was only marked for identification but the agricultural officer never appeared in court to produce it as exhibit. That the court could not rely on a report that was not produced.

8. Counsel submitted that the respondent admitted in his evidence that he never saw the appellant's cattle graze on his crop. That the respondent never called any eye witness. Further that the learned trial magistrate misdirected himself in finding that failure by the defence to call witnesses and to submit on the same meant that the evidence and submissions by the respondent were not challenged. That the appellant had filed a defence denying the claim. That his advocate had also filed submissions. Counsel urged the court to allow the appeal.

9. The advocate for the respondent, **Mr. G. Ombito**, submitted that the agricultural report was filed with the plaint and is therefore properly in record though marked and not produced. That the appellant did not question the veracity of the report nor did he challenge the figures therein. That the appellant did not offer evidence in court. Therefore that he cannot question the authenticity of the document during the appeal. That he is estopped to do so as he led the respondent to believe that the document was not challenged.

10. Counsel further submitted that the respondent stated that he saw the cows of the respondent grazing on his land on several occasions. That the evidence in record was sufficient and the trial magistrate reached the correct finding. Counsel urged the court to dismiss the appeal.

11. I have considered the evidence adduced at the lower court and the submissions made by counsels in this appeal. The issues for determination are:-

***(1) Whether the appellant's cattle grazed on the respondent's cane.***

***(2) Whether damage on the crop was proved.***

***(3) Whether the case was proved on a balance of probabilities.***

12. On the first issue the respondent gave contradictory evidence on whether he saw the appellant's cattle grazing on his crop. In his evidence-in-chief he was categorical that he did not witness the cattle grazing on his crop but that when he made the complaint to the appellant, the appellant admitted and promised to assist in planting costs. In that case the respondent's claim was based on the fact that the appellant had admitted the claim and not that he had seen the appellant's cattle grazing on his crop.

13. However in cross-examination the respondent departed from his evidence that he had not seen the cattle graze on his land to that he had seen them do so on several occasions. Further that he was with the agricultural officer on 21/3/2012 when they found the cattle grazing on the land. That before that date the cattle had grazed on his crop.

14. The plaint mentioned one date when the cattle grazed on the respondent's crop i.e. on 21/3/2012. The contradictory evidence of the respondent on whether or not he saw the cattle grazing on his cane created doubt on whether he actually saw the cattle do so. The contradiction painted the respondent as a witness who was not worthy of belief. The trial court did not consider the contradictions in the evidence. In my view there was no sufficient evidence that the appellant's cattle graze on the respondent's crop. The trial court erred in finding otherwise.

15. It is clear from the record that the agricultural officer's report was only marked for identification and was not produced. The case was adjourned on several occasions to enable the agricultural officer to appear in court to produce the report but he did not make any appearance. Eventually the respondent opted to close his case without his evidence.

16. The agricultural officer was an expert witness who is said to have assessed the extent of the possible damage on the respondent's crop. Without the report being produced in court as exhibit, there was no basis for the claim of Ksh. 105,000/=. The fact that the report was filed during pre-trial proceedings did not make it an exhibit in court. It had to be produced by the maker which was not done.

17. The trial magistrate alluded that the report was produced in court which was a finding not based on the evidence. He stated that a title deed was produced in court which was not captured in the proceedings. I think that the learned trial magistrate did not consider the evidence as presented in court but was swayed by some other material that was not part of the proceedings.

18. Section 108 of the Evidence Act Cap. 80 Laws of Kenya provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. In the case of **Kirugi & Another –Vs- Kabiya & Others (1987) KLR 342** it was held that the burden of proof was always on the plaintiff to prove his case on a balance of probabilities even if the case was heard on formal proof.

19. The respondent herein did not prove that the appellant's cattle grazed on his crop. He did not prove that there was any damage to the extent claimed. In the premises, the evidential burden did not shift to the respondent to require him to rebut the allegations. The fact that the appellant did not call evidence in the case or that his counsel did not make submissions did not shift the burden of proof to him when there was no evidence to respond to. Submissions by counsel is not evidence. The learned trial magistrate seems to have been mistaken on the requisite burden of proof.

20. The upshot is that the case against the appellant was not proved. The appeal is therefore allowed. The judgment of the lower court is set

aside and the suit against the appellant dismissed with costs to the appellant.

**Delivered, dated and signed in open court at Kakamega this 5<sup>th</sup> day of December, 2019.**

**J. NJAGI**

**JUDGE**

In the presence of:

Miss Shichenje holding brief for Matete for the appellant

Mr. Luyai holding brief for Ombito for the respondent

Parties:

Appellant

Respondent

Court Assistant - Polycarp

30 days right of appeal.