



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NO. 54 OF 2016

WILSON MUTEGI NYAGA.....APPELLANT

VERSUS

JOHANA MUTHENGI TOTO.....RESPONDENT

J U D G M E N T

1. **Johana Muthengi Toto**, the Respondent herein by way of Plaintiff sued the Appellant, **Wilson Mutegi Nyaga** claiming **Kshs. 86,905/=** being the value of damage occasioned on his crop by cattle stated to belong to the Appellant. He also claimed **Kshs. 10,480/=** being the expense he incurred following a clan meeting, costs and interest.

2. The Respondent filed a defence denying the allegations set out in the Plaintiff and prayed for the dismissal of the suit.

3. Facts of the case were that on the **10th day of May, 2016** PW5 **Tabitha Muthengi** the wife of the Respondent was on their farm herding their animals when she saw animals (cows and goats) that belonged to his brother-in-law, the Appellant grazing on their crop. PW2 **Anthony Muteti** the Agricultural Extension Supervisor assessed the damage done. He opined that the total damage occasioned was valued at **Kshs. 86,905/=**.

4. PW3 **Charles Nyaga** the Chairman of their clan convened meetings on three (3) occasions, the **5th June, 2016, 12th June, 2016** and **18th June, 2016** to arbitrate over the dispute but the Appellant declined to turn up. The clan authorized the Respondent to file a case in Court.

5. The Appellant in his defence stated that he was away in **Meru**. That he had grudge with the Respondent who is malicious and they are involved in a criminal case. Further, he stated that he had a herdsboy who looks after his goats. He prayed for dismissal of the suit. On cross examination he stated that he did not find out whose goats did the damage and admitted having disregarded the summons to attend the meeting an act that he justified by arguing that they had a grudge.

6. The learned trial Magistrate considered evidence adduced and concluded that the Respondent proved the case against the Appellant he awarded him general damages in the sum of **Kshs. 92,145/=** plus costs and interest thereon.

7. Aggrieved by the decision of the Court the Appellant appealed on grounds that: the learned Magistrate erred in law and fact by:

- Disregarding the Appellant's evidence.
- Relying on evidence of the Agricultural Officer.
- Allowing the Respondent to lead his witnesses in the course of proceedings.
- Awarding damages that exceed the value of damage occasioned.

8. At the hearing of the Appeal the Appellant submitted orally that the learned Magistrate was biased having favoured the Respondent. That evidence adduced was fabricated. That the person who was alleged to have seen the animals was not present and he was not invited when the damage was being assessed.

9. Further he submitted that the Respondent is his nephew who fabricated the case because of the assault case they had in Court against him. He explained that he failed to attend the meeting because he was not invited.

10. The Respondent urged that the learned Magistrate acted on evidence adduced. That the criminal case against him filed by the Appellant was dismissed. That the Respondent deliberately refused to attend the meetings that were sanctioned by the Administration.

11. This being the 1st Appeal, I have the duty to re-evaluate the evidence, assess it and make my own conclusions. (See **Selle vs. Associated Motor Boat Company Ltd (1966) EA 123; Williamson Diamonds Ltd vs. Brown (1970) EA 1**).

12. This is a matter where the Respondent stated that the Appellant's domestic animals (cows and goats) trespassed into his land and caused destruction to his crop. The Appellant argued that he was not present but there is a herdsboy who has the responsibility of herding his animals, an individual who was not called as a witness to rebut the allegations of PW5 the wife of the Respondent who saw the cows and goats on their land at **3.30 p.m.** illegally grazing on their crop. She saw 5 cows and 47 goats which had the mark 'MW' and belonged to the Appellant their relative. This evidence was not disputed by the Appellant.

13. There is further evidence adduced by PW6 **Mwangia M. Rwejia** their village elder who stated that on the evening of the material date, the **10th May, 2016**, the Appellant went to his home and requested him to go and check on the damage his animals had occasioned on the land. He went and ascertained the damage done. On cross examination he stated that the Appellant's cows are branded "WM" and that following the damage occasioned he went to the Assistant Chief with the owner of the land.

14. From the evidence adduced the Respondent did prove on a balance of probability ownership of the animals that strayed on his land and caused the destruction to the crop. Therefore the Appellant was liable for the tortious act.

15. The plaint was drafted by a person who is not of law profession or rather a lay man in law. The relief he sought was payment of **Kshs. 86,905/=** for crop damage and **Kshs. 10,450/=** for expenses of clan meetings.

16. This indeed is a special damages claim. Special damages must be specifically pleaded and proved (See **Coast Bus Services Ltd vs. Sisco E. Murunga Ndayi and 2 Others Civil Appeal No. 192 of 1992; Kampala City Council vs. Nakaye (1972) EA 446**).

17. PW2 the Agricultural Extension Officer did an assessment of the destroyed crop. The Appellant argued that it was in his absence. The report adduced in evidence however establishes that the village elder and representatives of the Community Policing Agents were present. Green grams damaged were on 3.00 Ha at the stage of pod formation. The total damage cost was **Kshs. 51,840/=**. Pigeon peas had reached the stage of flowering to podding on 1.5 Ha. The damage cost was **Kshs. 19,440/=**. Sorghum had reached the head formation stage on 2.5 Ha. The damage cost was given at **Kshs. 10,125/=**. Other damages noted were to the fence – **Kshs. 1,000/=**. Grass pasture and shrubs – **Kshs. 3,000/=**. Damage to stone terraces and trash lines – **Kshs. 5,500/=**. The total value was **Kshs. 86,905/=**.

18. The report filed by the Agricultural Officer buttressed the Appellant's claim and goes to prove the Special Damages claimed.

19. The learned Magistrate also awarded half the sum claimed as expenses of clan meetings. Although there was evidence that the clan Chairman convened a meeting of the clan to deliberate on issues of the crop damage where the Appellant failed to turn up, there was no proof that expenses were incurred therefore that claim fails.

20. In the premises I set aside the Judgment and Decree entered by the trial Court and substitute it with the following orders: The Appeal filed by the Appellant stands dismissed. Judgment is entered for the Respondent (Plaintiff) in the sum of **Kshs. 86,905/=** plus costs and interest. The Respondent shall also have costs of this Appeal.

21. It is so ordered.

Dated, Signed and Delivered at Kitui this 19th day of September, 2018.

L. N. MUTENDE

JUDGE