



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL APPEAL NO. 33 OF 2012

(Being an appeal arising from the Judgment and Decree of the Kitale Chief Magistrate M.N. Gicheru delivered on the 2nd day of October, 2012 in CMCC No 75 of 2011)

ATODOKORI K. LODOKAMAR.....APPELLANT

VERSUS

LOCHAUN LONGORIDENG.....RESPONDENT

JUDGMENT

1. The appellant sued the respondent in the lower court claiming inter alia a return of his 62 sheep and 53 goats or payment of their value thereof. The matter proceeded to full trial after the respondent filed his defence admitting that he took the courts pursuant to the agreement earlier entered but not honoured by the appellant.

2. The appellant testified that he came back home on 14/2/2011 only to be told by PW2 his mother that Lochana and Yatich had driven away his animals towards the home of the respondent. They are neighbours. Efforts to have the respondent return the animals were fruitless. He then went to the chief and later sought the assistances from the police. He said that the said animals were never recovered. He denied that he owed the respondent the sum of kshs 130,000/-.

3. **PW2 Regina Chepo Kassin Kirakwang** the appellant's mother testified on his behalf. She said that the 105 animals were taken away by 4 people towards the home of the respondent as she was herding. They followed the following day but they did not find them.

4. In his defence the respondent testified that he purchased 21 heads of cattle on 2/11/2010. The following day he learned from the herdsmen that 6 of the cows had disappeared. They looked for them in vain. However one Paul Miluka told him that the cows were traced to the home of the appellant. The appellant took off but later they entered into an agreement that he would bring back the animals or pay the sum of KSHS 130,000/-. That on that day he paid Kshs 5000/-. The appellant however defaulted and this prompted the appellant in light of the Pokot Customary Law to go and collect the sheep and goats from him which were for the equivalent value. Although the appellant did not give his proper name as he said that he did not have his identity card the respondent was certain that it was the appellant a person whom he knew.

5. **DW2 John Karani Lotodo** testified on behalf of the respondent. He said that he was in the elders meeting where the appellant accepted to pay the sum of Kshs 135,000/- in lieu of the stolen cattle. He said that he gave his name as Lodong'o for that is the name they knew at home. He said that the whole dispute was settled pursuant to the Pokot Customary Law.

6. **DW3 Tom Long'oleng'ura** a businessman at Chepchoina was also at the elders meeting. He said that the appellant admitted that he would pay the sum of Kshs 135,000/- and he proceeded to pay the sum of Kshs 5000/- on the spot.

7. At the close of the case the trial court dismissed the appellant case arguing that the whole dispute was settled vide the Pokot Customary Law which is recognised by the constitution.

8. The appellant has raised several issues in his Memorandum of Appeal. The parties equally have filed rival submissions. There is no doubt that the respondent lost his cows. There is no dispute also that the parties wrote an agreement. The issue however in my view is how the recovery of the sum of Kshs 130,000/- was undertaken. There is no clause in the agreement dated 12/11/2010 that failure to pay the sum of Kshs 130,000/- he shall proceed to attach his animals without any notice.

9. The respondent has supported that this was in line with Pokot Customary Law. In as much as this is true and in line with Article 159(2) (c) of the Constitution which states:-

“(2) in exercising Judicial authority, the court and tribunals shall be guided by the following principles

(a) -----

(b) -----

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute mechanisms shall be promoted.”

10. The traditional dispute mechanism obviously ought to fall within the province of the written law. I do not find anywhere the minutes of the elders but it is highly likely that they sat and considered the dispute and arrived at their verdict. I do not agree with the appellant that he was not at the meeting nor the fact that he did not sign. The fact that he did not use the name as it appears from his national identity card in my view does not from the evidence on record mean that he did not participate. There is no indication even from the respondent witnesses that they were dealing with a wrong party.

11. The only issue which I agree with the appellant is the manner in which the respondent executed the default. The written law does not countenance a situation where pursuant to a customary law the parties simply proceed to execute in the matter not provided in law. In any case, they would have clearly indicated the manner in which the default clause would have been undertaken. Otherwise as clearly suggested by the appellant counsel this is the law of the jungle and it amounts to day light robbery.

12. Having said that, the appellant equally did not come to court with clean hands. Having admitted that he took the respondent animals and admitted that he was going to pay the same he should have fulfilled his part of the bargain. He who comes to equity must come with clean hands.

13. Consequently and in line with the earlier quoted Article 159 (2) (c) of the Constitution this is a matter which ought to be settled under the customary law. Luckily the parties began the process but bungled along the way. This court legally can step in to remedy the situation. Both parties in my view have a strong argument. The respondent lost his cattle to the appellant and the appellant lost his sheep and goats to the respondent. I believe the intention of the elders was to put the parties in the *status quo ante*.

14. In light of the above observation I shall allow the appeal as follows:-

1) The appellant shall pay the sum of Kshs 130,000/- to the respondent who shall in turn within 60 days upon payment deliver the 62 sheep and 53 goats respectively to the appellant.

2) Each party shall bear their respective costs both in the high court and the lower court.

Orders accordingly.

Delivered this 2nd day of March, 2017.

H.K. CHEMITEI

JUDGE

In the presence of:

Barongo for Kaosa for Appellant

Arunga for Respondent

Court Assistant - Kirong