



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 55 OF 2012**

**ERNEST OGESI KIVAI ..... APPELLANT**

**VERSUS**

**JACOB ABWAO .....RESPONDENT**

*Being an Appeal from the Ruling and Decision of the Senior Principal Magistrate's Court in Maseno in PMCC Case number 42 of 2010 - J. M. Nangea Esq.*

**JUDGMENT**

- 1). The respondent filed a plaint dated 5<sup>th</sup> February, 2010 in which he sought general and special damages from the appellant. This followed injuries he suffered from dog bite. His case was that he was on 9<sup>th</sup> August 2009 at about 7:00a.m. attacked and bitten by the appellant's fierce dog which had caused the injuries. The injuries were on the right leg and ankle. He was attacked while walking along the road at Kidagai. The suit was based on negligence and/or breach of common law duty of care. The particulars included permitting a fierce dog to wander in public when he knew or ought to have known it was dangerous to do so; failing to tie the dog when he knew it was dangerous to let it free; and failing to give due notice and/or warning to the respondent and public about the fierce nature of the dog.
- 2). The appellant filed a defence denying all these claims and sought that the suit be dismissed with costs.
- 3). The respondent testified as did the appellant who called a witness, **DISHON LANG'O MUKHWANA (DW2)**. The trial court found the appellant liable in negligence and ordered him to pay general damages in the sum of Kshs. 500,000/=, and special damages of Kshs. 3,000/= together with costs and interests. The appellant was aggrieved by this decision and filed this appeal. In the Memorandum of Appeal he claimed that he was found liable and yet there was no evidence tendered to prove that he owned the dog; the case had not been proved on balance; his defence had not been considered; and that the awarded damages were excessive and not based on the evidence on record.
- 4). **MR. AMONDI** for the appellant and **MR. NYAWIRI** for the respondent filed written submissions. Basically, **MR. AMONDI** submitted that the case against his client had not been proved to the required standard while **MR. NYAWIRA** defended the decision of the trial court.
- 5). This Court is entitled to reappraise the evidence tendered before the trial court and draw its own conclusions thereon, while appreciating that the court had the advantage of seeing and hearing the witnesses who testified before it (**PETERS vs. SUNDAY POST LTD [1958] EA 424**). On quantum, the principles to be observed in deciding whether to disturb the finding of the lower court are whether the court took into account an irrelevant factor or left out of account a relevant one, or that, short of that, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (**KEMFRO AFRICA LIMITED t/a MERU EXPRESS SERVICES (1976) & ANOTHER vs. LUBIA & ANOTHER (NO. 2) [1987]KLR 30**).
- 6). The respondent testified that he was walking along the road outside the home of the appellant when a dog suddenly emerged from a hole and bit him on the right leg. He screamed for help and that was when one **LANG'O** came and rescued him. He (**LANG'O**) introduced himself as the worker of the owner of the dog. He told the respondent that the owner of the dog was the appellant. **LANG'O** walked

to the home of the appellant with the dog. The appellant's home is on the road, he said. The compound had some parts fenced with barbed wire and others surrounded by iron sheets and perimeter wall.

7). The appellant testified that he did not own any dog and that his home has a concrete wall. He stated that DW2 was his former employee and neighbour. DW2 was, however, not his employee at the time in question. DW2 stated that at the time when the respondent states he was bitten by a dog he (DW2) away in Nairobi visiting his aunt. He otherwise did not know the respondent and neither did he rescue him. He stated that the appellant's home was surrounded by fence. He did not know if the appellant kept dogs.

8). It was clear that the respondent did not on his own know whether the appellant had any dogs. He did not know whether the dog that bit him belonged to the appellant. He stated that he relied on DW2 to tell him that the dog that bit him belonged to the appellant. DW2 testified to deny that he either rescued him, or that he told him the dog belonged to the appellant. Against that evidence, the appellant stated that he kept no dog. The respondent's evidence, I find, was insufficient basis for the finding that the dog that bit him belonged to the appellant. Further, it had been pleaded in the plaint that the dog that bit the respondent was fierce, and known to be so, and therefore a danger to the public; and that the appellant had failed in his duty to restrain it. The respondent did not say he knew the dog before the incident. He did not say that he knew it to be fierce, or of any danger to the public. It follows that he failed to call evidence to prove the particulars of negligence that he had set forth

9). The result is that the trial court fell into error when it found that liability had been established against the appellant. The appeal is allowed. The judgment and decree of the lower court is set aside and in its place there shall be a judgment dismissing the respondent's suit with costs.

**Dated, signed and delivered at Kisumu this 7<sup>th</sup> day of May, 2014.**

**A.  
JUDGE**

**O.**

**MUCHELULE**