



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU**

Civil Appeal 29 of 2004

MOSES JOMO OLENGEBENAPPELLANT

AND

**SAMSON MASEA
JOHANA MASEARESPONDENTS**

(Appeal from the judgment of the High Court of Kenya at Kisii (Hon. P. K. K. A. Birech, Commissioner of Assize) dated 24th March, 2003

in

**KISII H.C.C. NO. 214 OF 1999)

JUDGMENT OF THE COURT

This is an appeal from the judgment and decree of Birech P.K.K.A. (Commissioner of Assize) dated 24th March, 2003.

The appellant in a memorandum of appeal dated 16th December, 2003 set out eight grounds of appeal as follows:-

- “1. The learned trial Commissioner of Assize erred in law when he awarded judgment jointly in favour of the respondents in the sum of Kshs.490,600/=, without any factual and/or legal basis, whatsoever.***
- 2. The learned trial Commissioner of Assize erred in law and in fact in entering judgment jointly in favour of the respondent for such amounts, which the respondents had not pleaded in the plaint or at all and thus occasioning a miscarriage of justice.***
- 3. The learned trial Commissioner of Assize clearly misdirected himself in law and in fact when he entered judgment jointly in favour of the respondents, notwithstanding the material discrepancies discernable from the evidence on record, particularly as concerns the cause of action.***
- 4. The judgment and decree of the learned trial Commissioner of Assize herein, amounts to a mockery of the doctrine of Stare Decisis, to the extent that the learned Commissioner of Assize, Hon. P. K. K. A. Birech, disregarded a binding authority of the Supreme Court without any lawful and/or reasonable basis.***
- 5. The learned trial Commissioner of Assize misdirected himself in law and fact when he made a finding that the oral evidence adduced by the respondents per se amounted to strict proof of liquidated damages, in flagrant contravention of the established principles of law.***
- 6. The learned trial Commissioner of Assize, fell in grave error when he awarded the sum of Kshs.260, 600/= in favour of the 1st respondent in complete disregard to the testimony of the 1st respondent, who never alluded to any such sum.***

7. ***The learned trial Commissioner of Assize failed to properly or at all, evaluate and/or analyse the submissions made on the part of the appellant and thus reached a wrong decision.***

8. ***The judgment and/or decision of the learned trial Commissioner of Assize herein, is contrary to the weight of evidence on record and hence manifestly unsafe.***”

When the appeal came up for hearing, the learned counsel Mr. J. M. Oguttu represented the appellant and the learned counsel Mr. J. N. Ondika represented the respondents.

During the hearing Mr. Oguttu abandoned grounds 7 and 8 and for this reason we have refrained from making any comment on these two grounds. In his submissions, Mr. Oguttu combined grounds 1, 2, 4 and 5, and similarly submitted on grounds 3 and 6 together.

Concerning the first set of grounds Mr. Oguttu submitted that in the plaint the respondents had claimed Ksh.500/75 as special damages and therefore there was need for strict proof of the amount and according to him no evidence whatsoever was adduced in support of the amount claimed in paragraph 3 of the plaint. Mr. Oguttu added that the amounts separately claimed by the respondents namely Ksh.260,000 by the first respondent and Ksh.230,000 by the second respondent amounted to Ksh.490,000 and the value of the cows as set out in the charge sheet in respect of the first respondent was Ksh.230,600 and Ksh.250,000 for the second respondent respectively. Faced with three estimates of the value as set out above Mr. Oguttu submitted that the superior court erred in not seeking an expert opinion on value or explanation as to how it accepted the figure appearing in the judgment and the error made by the Court is clear from holding 9 in the case of ***VIRANI T/A KISUMU BEACH V. PHOENIX OF EAST AFRICA ASSURANCE COMPANY LTD [2004] 2 KLR, pages 269 – 280*** where the Court stated:-

“A claim for special damages should not only be pleaded but strictly proved. What amount to strict proof depends on circumstances, that is to say, the character of the acts producing damage, and the circumstances under which those acts were done.”

On grounds 3 and 6 Mr. Oguttu submitted that in view of the existence of three sets of values of the cattle stolen there was no proof of the amount awarded in the judgment as per the above holding and that without an amended plaint, the superior court acted on material not pleaded in the plaint. On this point the learned counsel relied on this Court’s decision in the case of ***PROVINCIAL INSURANCE CO. E.A. LTD V. MORDEKAI MWANGA NANDWA Civil Appeal No. 179 of 1995*** where the Court approved the holding in the English case of ***BLAY V. POLLARD AND MORRIS [1931] K.B. 682*** where Scrutton L. J. held:-

“Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the Judge decided was raised by himself without amending the pleading, and in my opinion he was not entitled to take such a course.”

In the final submission Mr. Oguttu submitted that the discrepancies on value were substantial and were not reconciled by any evidence and further that the errors were such that they could not be rectified under **section 99** of the Civil Procedure Act.

Mr. Ondika, the learned counsel for the respondent supported the judgment of the superior court in that the value of the cows as per the charge sheet was never challenged at all and the respondents had indicated Ksh.30,000 as the value of each of the twenty five (25) cows; and that a party who claims special damages of a particular amount is not necessarily granted that amount by the court and the court retains the power to award any proper amount and this is what the court did; and that the failure of two separate claims described in the plaint to add up to the figure claimed in the plaint was not fatal to the claim and this per se should not render the judgment defective.. In this regard, the learned counsel relied on the **VIRANI** case supra and stated that what constituted strict proof of special damages depends on circumstances and the amounts set out in the charge sheet did in the circumstances, and in absence of any challenge constitute sufficient proof. In addition the respondents did orally testify on the value of the cattle stolen and finally that all the cases cited dealt with the issue of damages in

insurance matters and not with the issue of the value of cattle which is the subject matter of this appeal and finally that an expert evidence on the value of cattle was not necessary.

As this is a first appeal, this Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusion always bearing in mind and giving due allowance, that the trial Judge had the advantage of seeing and hearing the witnesses testify before him see **VIRANI t/a KISUMU BEACH RESORT VS PHOENIX OF EAST AFRICA ASSURANCE COMPANY LIMITED (supra)**.

We think the combined value of Kshs.490,000 being the value of the two respondents' stolen cattle which figure was in turn derived from the charge sheet and the oral evidence of the two respondents; taking into account that liability had been admitted by the appellant and that no conflicting values were given by the appellant, the superior court was perfectly entitled to accept the charge sheet figures, it being borne in mind, that the standard of proof was on a balance of probabilities. Again, there was nothing on record to counter the value as accepted by the court.

As regards the value of the cattle in our view the court was perfectly entitled to accept the oral evidence of the two farmers on the value of their respective herds of cattle, because the law must accord with common sense principle that cattle owners know the value of their toil and that in real life situations, formal valuations of cattle is not a prerequisite to recovering their value in court because the court would be perfectly entitled to rely on the prevailing local value of cattle as per the evidence of the local farmers and the two respondents were such farmers. In some cases such as this, we are of the view that a court of law is entitled to have regard to the local circumstances including the local market values.

In the result we uphold the judgment of the superior court and dismiss this appeal with costs to the respondents.

It is so ordered

Dated at KISUMU this 5th day of February, 2010.

P. K. TUNOI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR