Kurui & another v Chebotibin (Civil Appeal E011 of 2022)
[2024] KEHC 3586 (KLR) (22 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3586 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CIVIL APPEAL E011 OF 2022

RB NGETICH, J

MARCH 22, 2024

BETWEEN

ISAAC KURUI ..... 1ST APPELLANT

MARY TOMNO ..... 2ND APPELLANT

AND

JULIUS K CHEBOTIBIN ..... RESPONDENT

(Being an appeal from the judgement and decree of Hon V.O Amboko(SRM) in Kabarnet Chief Magistrate's Court Civil suit No. 27 of 2021 delivered on 7th November,2022)

JUDGMENT

1. The Respondent herein instituted a suit in the lower court through Plaint dated 13th July, 2021 seeking judgement against the Defendants and their agents severally claiming the following:-
    a. Special damages of Kshs.34,000/=
    b. General damages for the loss occasioned.
    c. Costs and interests of the suit.
2. The Plaintiff/Respondent claim arose from alleged destruction of plaintiff's seedlings on 23rd March,2021 and 2nd April,2021 by the appellants unattended goats. He averred that he reported the destruction to the appellants and in a meeting held by local elders, it was established that 33 grafted mangoes had been destroyed and the local leaders assessed the damage at kshs 9,900/= for the second incident and the assessment for the second incident was kshs 2175/=.Upon failure by the appellants to compensate the respondent, the elders gave the respondent a letter to take to the agricultural officer who valued the damaged seedlings at Kshs.34,300/=.

3. In the appellants/defendants' defence dated 9th August,2021, the appellants denied the allegation that the Defendants goats invaded the plaintiff's farm between 23rd March, 2021 and 2nd April,2021 and denied receiving any communication of destruction of the seedlings by the respondent and stated that if there was any communication which they deny, the same was through third parties and the communication did not reach them. They further denied being summoned to a meeting and/or assessment of the damaged crops.

4. The appellants denied attending elders meeting and/or that they established that 33 grafted mangoes were destroyed and/or that it was valued at Kshs.34,300/= by the Agricultural officer. The appellant urged the trial court to dismiss the Plaintiff's suit with costs.

5. Upon hearing the parties herein, the trial Court delivered judgment on the 7th day of November, 2022 finding that on a balance of probabilities, the respondent/plaintiff had proved that 33 of his seedlings were destroyed by the appellants'/defendants' goats and awarded special damages of Kshs. 34,300/ = and general damages of Kshs.20,000/= and entered judgment against the Defendants jointly and severally plus costs of the suits and interests at court rates from the date of judgement until payment in full.

6. The Appellants being dissatisfied with the Judgement of the trial court filed this appeal on the following grounds: -

    a. The Learned magistrate erred in law and in fact in holding that the Respondent had proved its case on a balance of probabilities.

    b. That the Learned trial magistrate erred in law and fact in not considering the evidence tendered in court by the Appellants.

    c. That the learned trial Magistrate failed to take into consideration the fact that PW 4'S evidence was based on a report which did not reflect what was on the ground since he did not visit the land where the property was allegedly destroyed by animals.

    d. That the learned trial Magistrate erred in law and in fact in taking into consideration extraneous evidence and prayers.

    e. That the learned Magistrate gave a judgement which was biased against the Appellants and not based on facts and evidence tendered before the Honourable court.

7. The Appellants prayed that the judgement of the lower court be set aside and the Respondent's claim be dismissed. This appeal be canvassed by way of written submissions.

Appellants' Submissions

8. The Appellants filed written submissions dated 6th November, 2023 and argue that from the trial court's judgment, it is discernible that the honorable magistrate vindicated the plaintiff's evidence and therefore decided to awarded him general damages tabulated at Kshs. 20,000/=.

9. That there was no evidence tendered identifying the goats which destroyed the Respondent's crops. That PW2 and PW3 who are said to have identified the goats have not produced in court either a photograph or tangible identifying mark to associate the goats with the defendants.

10. Appellants further submitted that DW2 testified that he herded the goats until evening when he locked them in their shed and there is no way the goats could have trespassed and destroyed the plaintiff's crops; further that besides evidence of PW2 and PW3 of seeing the goats at the respondent's farm,

there was need for a photograph or specific way of associating the goats to the defendant's and argue that on that ground, the respondent did not prove his case on a balance of probability.

11. The appellants submit that the Judgment of the trial court is biased; that whereas a court of law has wide discretion in making judgment, the cardinal principle of natural justice is that such judgment must be guided by the evidence presented before court and in this case, the trial magistrate decided to award general damages of Kshs. 20,000/= to the plaintiff whereas the respondent pleaded special damages of Kshs. 34,300/= in his plaint.

12. That it is trite law that in cases of crop damage, the plaintiff has to plead special damages and strictly prove the same which was not the position in this case because the plaintiff's witness pw4 the Agricultural Officer has neither proved special damages cogently nor particularized them clearly and cited the case of Coast Bus Services Limited =Vs= Sisco E. Murunga Ndayi & 2 Others Civil Appeal No. 192 Of 1992 cited by Justice W. Ouko in Rift Valley Agricultural Contractors Limited =Vs= Kenya Wildlife Service{2011} EKLR.

13. Further that the plaintiff did not prove special damages of Kshs. 34,300/= as report produced by PW4 is of no probative value since the witness confirmed in his evidence, both in chief and in cross - examination that he did not visit the land in question. That the figures he gave were estimations and could increase or decrease if he had visited the land. That the report is therefore unreliable, contains hearsay and is fake.

14. Further that general damages of Kshs. 20,000/= is not supported by law and ought to be expunged; that there is only one prayer and court's judgment is not pegged on the evidence presented before court but on other factors. It is their submission that the respondent did not prove his case on a balance of probability as required.

15. Further that evidence of DWI point to contradictions on the evidence of PW1, PW2 and PW3; that there is variation on dates when the goats entered into the land as PW1 states that it was on 23rd March 2023 and 2nd April 2023 whereas DW2 has maintained that he was with the goats on the day of 23rd March 2023 until he closed them in their shed. They urge this court to find that the judgment of the trial court's was biased, was based on extraneous issues, cannot stand and urged this court to dismiss with costs.

Respondents Submissions

16. The Respondent argues that pursuant to provisions of Section 107 to 109 *Evidence Act* CAP 80 Laws of Kenya, the onus of proving the existence of any fact lies with whoever is alleging its existence in tandem with the legal principle that he who alleges must prove and relied on case of Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR and in the case of William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 and further, the case of Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, where the judges of Appeal cited with authority the finding of Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372.

17. The Respondent submits that his witnesses ably identified the goats in question as belonging to the Appellants. That PW1 stated that he attended a public meeting where the 1st Appellant publicly admitted that 4 of the goats belonged to him and the 2nd Appellant publicly accepted that one goat was hers and pw1's evidence was not shaken by cross examination or any other evidence.

18. Further that PW2 who was the chairperson of village elders stated that four of the goats were identified as belonging to the 1st Appellant and was confirmed by the 1st Respondent's mother, and further stated that 2nd Appellant went to the Respondent's farm and identified one of the goats as being hers.

19. The Appellant submits that PW3 a neighbor to the Respondent stated that the 2nd Appellant after being informed of the damage caused, called the 1st Appellant who was in Nairobi and who agreed to pay as per their assessment of the damage, and that it was only then that the Respondent agreed to release their goats.

20. He submits that even DWI who is the 2nd Appellant's son admitted that he entered into negotiations to reimburse the Respondent's damage to his tree seedlings and that he informed his parents of the assessed damages, and further states that the respondent told him to take the seedlings to his home and pay him Kshs.100/= but he told him Kshs. 100/= was too high and they agreed to pay Kshs. 75/=. He said he informed his parents who promised to see how pay; and from the foregoing, the respondents proved that the Appellants were negligent in handling their livestock and ought to be held culpable as was established by the trial magistrate.

21. The Respondent further submits that the failure to take photographs and present receipts of seedlings does not affect the substance of the evidence adduced. That it is understandable not to avail the receipts as it would be impossible to get them; and that he established negligence on the Appellants' part; that the pendulum swung in the other direction and as such the burden of disproving his assertions lay with them as was stated in Evans Nyakwana vs. Cleophas Bwana Ongaro (supra) eKLR.

22. The respondent further submits that 1st Appellant who testified as DW2 while denying the claim said he was not around on 23rd March 2021 when the incident occurred and his testimony was therefore of little probative value. Further that the appellants have not proved the alleged bias by the trial magistrate.

23. The Respondent cited the case of Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982 - 1988] IKAR 278 where the court stated that an appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence or it is demonstrated that the court below acted on wrong principles in arriving at the finding and relied on the case of Mbogo & Another vs Shah, [1968] EA.

24. In conclusion, the respondent submits that the Appellants were duty bound to demonstrate that the trial Magistrate failed to apply or misapplied specific provisions of the law, but have only stated mere allegations of the same. He prays that the Appellants' appeal be dismissed with costs.

Analysis And Determination

25. This being a first appellate court, the duty of the first appellate court was set out in the case of Selle vs. Associated Motor Boat Co. [1968] EA 123 where the court state das follows:-

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

26. Further in the case of Ramjibhai vs. Rattan Singh S/O Nagina Singh [1953] 1 EACA 71 East African Court of Appeal stated as follows: -

> " This Court will not disturb a finding of a trial Judge merely because of an irregularity in the format of the judgement if it thinks that the evidence on the record supports the decision."

27. In view of the above, I have perused and considered evidence adduced before the trial court together with submissions filed by parties herein. The respondent had the burden of proving that the appellants' goats destroyed his seedlings. The issue of burden of proof was discussed in the case of Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR where the court stated as follows: -

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden ... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

28. What amounts to proof on a balance of probabilities was stated by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 who stated as follows: -

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

29. The appellants argue that there was no sufficient evidence on identification of the goats linking them to the appellants. Having looked at the above authorities, it is trite law that what is expected of the respondent is to prove on a balance of probabilities not beyond reasonable doubt. It is clear from evidence adduced that the respondent's seedlings were destroyed and as to whether the goats belonged to the appellants,Dw1 who is 1st Appellant's son and the one who was herding the goats talked of having tried to negotiate over the damage with the respondent and promised to talk to his parents. He further confirmed that he actually spoke to DW2 about the damage. It is also confirmed by pw2 and pw3 who are independent witnesses being village elder and neighbor respectively that there was damage of respondent's seedlings being mangoes, sandarac and Avocado seedlings. Further, pw2 a village elder informed court that 1st appellant admitted that of the 5 goats who destroyed the seedling, 4 were his and one belonged to 2nd appellant. This evidence was corroborated by pw3.1st appellant confirmed that he was not at the scene and could not therefore confirm what happened neither did he adduce evidence to discredit evidence by the respondent and his witnesses.

30. Record show that in the first incident, the 1st Appellant they assessed damages at Kshs.100 per seedling and upon negotiation the total was Kshs.2175/= but was not paid and again on the 2nd April,2021 the goats damaged the seedlings again and the respondent decided to tether the goats and notified the 1st Appellant. Upon village elders meeting on 3rd April,2021, the 2nd Appellant identified one goat as hers while Isaac identified his four goats. Responded said he called 1st Appellant on 2nd April 2021at

4 pm and the following day on 3rd April,2021 two women being 2nd appellant and 1st Appellant's mother went and identified their goats; that 33 seedlings being a mixture of oranges and mangoes were destroyed and elders assessed at Kshs.300 each making a total of Kshs.9,900. Minutes of the meeting were recorded.

31. PW3 Dickson Keitany Mutai confirmed that on 3rd April 2021 when they assessed the damage, the 2nd Appellant was present and they assessed Kshs.300/= per seedling per seedling and 33 seedlings had been destroyed making total value kshs 9,900/=.

32. Record show that the 1st Appellant's mother identified goats for 1st appellant and said in the meeting that she had informed the 1st appellant and one goat belonged to 2nd respondent. That the goats were released and appellants asked to pay the assessed value of seedlings by 10th April,2021 but they failed to pay and on 13th April,2021 they sat and forwarded the issue to the ministry of Agriculture by way of a letter to the Agricultural officer through the Plaintiff and the agricultural officer assessed damage at on 26thApril 2021.Pw4 confirmed that he did valuation on 26th April,2021.He said he did not visit the land but carried out tabulation based on the grafted seedlings. He produced the report in court.

33. PW 5 Miriam Cherop who is the area Assistant Chief said she visited the farm on 3rd April,2021 and found 5 goats in the farm and the goats were identified as belonging to the 1st and the 2nd Plaintiff. She said she forward a letter dated 23rd April, 2021 to the ministry of agriculture.

34. From evidence adduced, the respondent found 5 goats in his farm on the 2nd April, 2021 having destroyed his seedlings. He tethered the goats and informed the 1st Appellant and called village elders for a meeting on 3rd April, 2021 where then the 2nd Appellant and the mother to the 1st Appellant were in attendance. That 1st Appellant's mother identified 4 goats belong to 1st appellant while the 2nd Appellant identified one goat as hers.

35. This evidence of identification of the goats was corroborated by the evidence of PW 2, PW 3 who were the village elders present in the meeting. The people in the meeting were from the same village, they knew each other and they confirmed that the 5 goats were identified and this was corroborated by defence witnesses, DW 2 and DW 3 who place the appellant's goats at the scene.

36. From the foregoing, there is no doubt that the plaintiff proved that the goats which entered his farm and destroyed his seedling belonged to 1st respondent and the 2nd defendant.

37. In respect to assessment of damages, the plaint show that the respondent prayed for both special and general damages. Evidence adduced show that the agricultural officer who testified as pw4 said he did not visit the scene/land to assess damages. The question that arises is how did he come up with calculation and what made the figure rise from kshs Kshs.9,900 to kshs 34,300. The initial assessment for earlier destruction of seedlings was kshs Kshs.2175/=. The village elders were in the farm on 3rd April 2021 and they did assessment and came up with figures of kshs Kshs.9,900 for 33 seedlings destroyed during the second incident. No justification has been given for the raised valuation done by pw4 person who did not visit the scene/land. In view of the above I find that assessment of kshs 34,300 was not sufficiently proved. I am therefore inclined to set aside award of kshs 34,300 under special damages and award kshs 9,900 plus kshs Kshs.2175/= bringing a total of kshs 12,075/=.

38. In respect to general damages of Kshs. 20,000/=I am guided by the decision in the case of Butt v Khan (1982-1988) KAR 1, the Court of Appeal stated that:

> " An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge

proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

39. It is not true that the respondent did not pray for both special and general damages as the prayer is in the plaint. He sought special and general damages occasioned to the respondent owing to the destruction of his crops. I have considered the holding in the above authority and upon looking at record, there is no indication that the trial court considered irrelevant matter or failed to consider any relevant matter. General damages occasioned to the respondent owing to the destruction of his crops. The learned trial magistrate therefore applied the correct principle in assessing the general damages and the award of Shs.20,000 as general damages is not so inordinately high as to be wholly erroneous estimate of the damages in the circumstances of this case.

40. From the foregoing, I decline to interfere with that award under general damages and uphold it. The respondent proved on a balance of probabilities that the appellants are liable for destruction of his seedling. In the end, I find this appeal partly succeed.

Final Orders: -

1. Appeal partly succeeds.
2. Award of Kshs 34,000 is hereby set aside and respondent awarded Kshs 12,075/-.
3. General damages of Kshs 20,000 to remain as awarded by trial court.
4. Half cost of the appeal to be paid to the respondent.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 22TH DAY OF MARCH 2024.

.....

RACHEL NGETICH

JUDGE

In the presence of:

* Court Assistant, Sitienei.

* Mr Mwaita for Appellants present.

* Respondent present.