THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

HCT-00-CV-CA-0011-2007

(Arising out of C.S. No. 003 of 2006 of Luwero Chief Magistrate's Court)

KAVUMA CHRISTOPHER ::APPELLANT

VERSUS

1. KAKOOZA LAWRENCE
2.TUMUSIIME GODFREY ::::::::::::::::::::::::::RESPONDENT(S)

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

JUDGMENT

The appellant appealed to this court against the decision of the Magistrate's Court of Luwero at Luwero wherein he dismissed his suit. The appeal is based on the following grounds:

1. ***The learned trial Magistrate erred in law and fact in finding that the appellant relied on hearsay evidence.***

2. ***The learned trial Magistrate erred in law and fact when he relied only on the opinion of the Veterinary Doctor.***

3. ***The learned trial Magistrate erred in law and fact when he failed to generally evaluate the evidence and thereby came to a wrong decision.***

4. ***The learned trial Magistrate erred in law and fact when he prevented the appellant's witnesses from giving evidence even when court had summoned them.***

The thrust of the above grounds when considered together is that the learned trial Magistrate erred in law and fact in finding that it is not the respondent's cattle which caused the death of the appellant's cow.

It is the duty of the first appellate court to review the record of evidence for itself in order to determine whether the decision of the trial court should stand.

The appeal was filed here as long ago as May 2007. It would appear that in the course of time the original court file got lost. Hence this duplicate file.

When the appeal came up for hearing on 6/4/2010, the appellant and 1st respondent appeared in person. The appellant indicated to court that he had a lawyer, a one Mr. Kityo, who had however gone to another court at Nakawa. This being an old matter, I directed both parties to file written submissions through their respective Counsel. Up to the time of writing this judgment the appellant had not obliged. The respondents did.

I will do the best I can on the basis of the available material.

Learned Counsel for the respondents, Mr. Hudson Musoke, has submitted that judgment in the lower court was delivered on 20/03/2007; that appellant lodged a notice of appeal on 30/03/2007; that the record and judgment of the lower court were certified on 23/03/07; and that the memorandum of appeal was filed on 4/05/07 outside the 30 days time limit. Hence the submission that the appeal was filed out of time, in the absence of an application to extend the time. He has prayed that the appeal be dismissed on account of the same being non-existent.

It is trite that a notice of appeal is a preliminary step in the filing of an appeal. It is followed by a memorandum of appeal detailing the grounds on which the appeal is based.

In the instant case the notice of appeal was lodged promptly, 10 days after the decision of the lower court. While the records indicate that the copy of judgment was certified on 23/03/2007, 3 days after delivery of judgment, court cannot tell whether the same was availed to the appellant promptly on request. Courts difficulty in this regard has been compounded by the disappearance of the original court file and the appellant's failure to respond to this objection.

I would in the spirit of Article 126 (2) (e) of the Constitution give the benefit of the doubt to the appellant and assume on the balance of probabilities that the appeal is properly before court.

Turning now to the substance of the appeal, that the appellant's cow died does not appear to be in serious dispute. What is in dispute is how it died.

The appellant was categorical that he was not present when the incident happened. His case is therefore based on evidence of three people: PW2 and PW3 who allegedly saw cows fighting and PW4 a Veterinary Doctor who examined the carcass.

From the evidence of PW2 Kawalya Martin, he did not know the two respondents before 26/01/2006. However, he was in the area looking for his lost cattle when in a distance of about 70 metres he saw cows push each other. He did not know whether or not they were tethered. He then met the 2nd respondent some distance away and in his own words:

"assumed D2 was the one herding the cattle."

It is not in dispute that the 2nd respondent was the first respondent's herdsman. From his evidence, he left cattle fighting each other. He did not know whose cows they were. Later in the evening, he met the appellant who told him that his cow had been killed by Kiika's cattle. He (PW2) moved with the appellant to Kiika's home and according to him, Kiika agreed to settle the matter amicably with the plaintiff/appellant. The next

morning he met the appellant again who told him that he was still waiting for the owner of the cattle whom he did not know. That is where his involvement stopped.

From the evidence of this witness, up to 27/01/06 the appellant did not know whose cows killed his own. He suspected Kiika. PW2's evidence was at variance with that of the appellant. According to the appellant, at the side of his dead cow was found the 1st defendant's cow. It had apparently remained behind. It is this cow which the local authorities placed in the custody of Kiika alias Kihika George until the case was resolved.

There is an agreement dated 27/01/06 to that effect in the Luganda language. The trial court did not mind to have it translated. Clearly, therefore, when PW2 claims that Kiika agreed to settle matters amicably with the plaintiff/appellant, thereby giving the impression that Kiika was the owner of the cows suspected to have killed the appellant's cow, he either told a lie or indeed Kiika was the first suspect.

Be that as it may, PW2 ceased to get involved in the matter before witnessing any discussion between the appellant and the 1st respondent, the alleged owner of the cows which killed appellant's and he did not know him prior to all this anyway. Since he did not know whose cows were involved in the fight and he saw the cows from a distance of about 70 metres, his evidence was worthless. He appears to have assumed that because D2 had been seen herding cattle in the area, therefore his cows were responsible for the death of the appellant's cow. This was a mere assumption. It is not direct evidence capable of proving a fact.

The appellant's other witness, PW3 Bogere, also claimed to have been in the area and that he saw some cows fighting. His evidence is that the appellant's cow was tethered on the grass and he saw cattle being herded by D2 fighting the tethered cow. Then around 1.00 p.m. he met the plaintiff/appellant who informed him that his cow had died. If the evidence of this witness is to be believed, then it was not necessary for the appellant and PW2 to go looking for Kiika that evening or even the following day. Even then the totality of his evidence is that he saw fighting cows from a distance of about 10 yards,

that he left after the cow had fallen down, that the cow he saw fall down was tethered on a rope. As fate would have it, the evidence of the Veterinary Doctor who visited the scene the following day does not support the evidence of PW3. Whereas PW3 claimed that he saw the cow fall by the neck, whatever that meant, PW4 found it lying upside down, on its right hand side. A rope was tied at the base of the horns and it was folded on the right hind leg. The remaining part of the leg was free. Though he was told by the appellant that the cow had been tethered, tied on to something and according to PW3 on to some grass, the Doctor couldn't locate on what object it had been tied. The appellant also failed to trace the site. The rope was straight, unfolded.

And while the evidence of PW2 Kawalya and PW3 Bogere paints a picture of a savage attack of the cow by other cows, the expert witness looked for evidence of external violence and saw none. The animal horns had dug deep in the soil, and the carcass had a twisted neck. The part around the horns and hind leg where the rope passed were smeared with blood. He came to the conclusion that the animal could have fallen down due to stepping on the rope and died of suffocation. Otherwise the vegetation around the animal was intact and there was no evidence of any object having passed through it.

It is trite that a fact is said to be proved when the court is satisfied as to its truth. The evidence by which that result is produced is called the proof. The general rule is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. Relating the principle to the instant case, the appellant had alleged that his cow was killed by the cows of the respondents. The burden was on him to prove the allegation on a balance of probabilities.

As it stands the evidence on record raises a number of possibilities as to how the cow died. It may have been killed by the cow of one Kiika; it may have been killed by the cows of the 1st respondent which the 2nd respondent was herding at the time; or in the opinion of the Veterinary Doctor, an expert of sorts, the cow may have stepped on its own rope, tripped and died of suffocation.

The possibility of the cow being killed by other cows becomes doubtful upon considering the nature of the vegetation around the animal being intact, without any evidence of disturbance. Learned counsel for the respondents has submitted that having accepted the expert evidence, the rest of the witnesses could not have been used to contradict the same. This observation is of course partly correct. It is partly correct in the sense that for court to come to a decision all the evidence must be considered together.

It is trite to say that if the conclusion of the trial court has been arrived at on conflicting testimony after seeing and hearing the witnesses, the appellate court in arriving at a decision would bear in mind that it has not enjoyed this opportunity and that the view of the trial court as to where credibility lies is entitled to great weight: ***Flora Mbambu & Anor vs Serapio Mukine [1979] HCB 47***.

On revaluation of evidence in the instant case, I have come to the conclusion that the trial Magistrate subjected the evidence before him to adequate scrutiny. The evidence of the appellant's own witness, the veterinary doctor, punched a huge hole in the appellant's case. In view of the inconsistency in the evidence of the two alleged eye witnesses, PW2 and PW3, the trial Magistrate was entitled to find that the plaintiff/appellant had failed to establish his case on a balance of probabilities that the defendants/respondents' cows caused the death of his cow. There is therefore no reason for me to interfere with his judgment.

The above analysis disposes of Grounds 1 – 3.

In the 4th ground of appeal the appellant complains that the learned trial Magistrate erred in law and fact when he prevented the appellant's witnesses from giving evidence when court had summoned them.

The list of witnesses annexed to the plaintiff/appellant's plaint indicates three names:

1. Kavuma Christopher

2. Bogere Yokosafati
3. Veterinary Officer.

It also indicates that he would lead evidence of other witnesses with leave of court. All the listed witnesses testified. In fact although Kawalya Martin (PW2) had not been listed as appellant's prospective witness, he was allowed to testify. This is the same witness who testified that on seeing the plaintiff/appellant in the evening of 26/01/06, he (the appellant) told him that his cow had been killed by Kiika's cattle. This evidence was inconsistent with the appellant's own case. The record of proceedings does not indicate anywhere that the learned trial Magistrate prevented any of the appellant's prospective witnesses from testifying. If any name on the list of witnesses had been left out, I would be inclined to give him the benefit of doubt. They all gave evidence. In these circumstances, I also find no merit in this ground of appeal. In the result the appeal is dismissed with costs to the respondents.

Orders accordingly.

Yorokamu Bamwine
JUDGE
20/05/2010

20/05/2010:
Hudson Musoke for respondents present
1st respondent present

Court:
Judgment delivered.

Yorokamu Bamwine

JUDGE

20/05/2010