

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**  
**CIVIL APPEAL NO. 0022 OF 2014**

**(Arising from FPT – 08 – CV – 159 of 2013 before His Worship Opio James Magistrate  
Grade 1 at Kyegegwa)**

**GUMISIRIZA BISIGI INNOCENT** }  
**KUSEMERERWA JOVIA** } .....**APPELLANTS**

**VERSUS**

**KATURAMU PAUL.....RESPONDENT**

**BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE**

**Judgment**

This is an Appeal against the judgment and decree of His Worship Opio James Magistrate Grade 1 given at Kyegegwa in Civil Suit No. FPT – 08 – CV – 159 of 2013 on the 24<sup>th</sup> April 2014.

**Brief facts**

The Respondent instituted a Civil Suit against the Appellants for recovery of UGX 732,550/= and costs of the Suit. That on the 20<sup>th</sup> and 29<sup>th</sup> of October 2013 the Appellant's cows strayed and destroyed the Respondent's maize which was assessed by the Agricultural Officer and valued at UGX 732,550/=. That effort to settle the matter amicably has been futile.

The Appellants on the other hand in their Written Statement of Defence denied all the Contents of the plaint and averred that much as they own cattle and are neighbours to the Respondent their cattle has never destroyed the Respondent's crops.

The trial Magistrate found in favour of the Respondent and awarded him special damages and costs.

The Appellants being dissatisfied with the decision of the trial Magistrate lodged this Appeal whose grounds are as follows;

1. That the trial Magistrate erred in law and in fact when he failed to properly evaluate the evidence thereby arriving at a wrong decision.
2. That the learned trial Magistrate erred in law and in fact when he held that the Appellant's cows strayed and destroyed the Respondent's maize garden.

3. That the learned trial Magistrate erred in law and in fact when he failed to take into account the principles of awarding damages.

M/s K.R.K Advocates appeared for the Appellant and M/s Ahabwe James & Co. Advocates appeared to the Respondent. Both parties agreed to file written submissions.

Grounds 1 and 2 are discussed together and 3 separately.

#### **Grounds 1 and 2:**

**1. That the trial Magistrate erred in law and in fact when he failed to properly evaluate the evidence thereby arriving at a wrong decision.**

**2. That the learned trial Magistrate erred in law and in fact when he held that the Appellant's cows strayed and destroyed the Respondent's maize garden.**

The duty of the first Appellant Court is to evaluate the evidence on record a fresh as a whole and draw its own conclusions bearing in mind that it neither saw nor heard the witnesses at trial. The guiding principle was well stated by Law J. A. (as he then was) in the case of **Karanja Kago vs Karioki Njenga and Edward James Mungai, Civil Appeal No. 1 of 1979 (K-CA)** where he held that;

*"A first appeal is by way of re-trial and the Appellate Court is in as good a position as the Trial Judge to make findings of fact and to draw inferences from those facts but to bear in mind that it has neither seen nor heard the witnesses and should make due allowance of this fact."*

Counsel for the Appellants submitted that on proper evaluation of the evidence on record, the trial Magistrate should have arrived at the conclusion that; there was no case against the 2<sup>nd</sup> Appellant since there was no evidence that the cows that trespassed on the Respondent's property were joint property; that there were inconsistencies in regard to the number of the cows that were returned to the Appellant's daughter Patience; that the Appellant's herdsman is not Godi but rather Mubarak Jafari (DW1); and that Patience could not have received the cattle because she was away for burial in Ibanda. That, the trial Magistrate should not have heavily relied on the assumption that since the Appellant's cattle had destroyed the Respondent's crops in 2011, the same reoccurred in 2013.

That the Appellants consistently testified that their daughter does not graze cattle and DW1 stated that the cattle have never strayed while he grazed them; and that the Appellants did not know Godi or ever hire him.

That with all the above flaws and PW4 Kansime Eunice's evidence which was mere hearsay and inadmissible, **Sections 58 and 59** of the Evidence Act ought not to have been relied on by the trial Court. Thus, the trial Magistrate failed to properly evaluate the evidence on record and thereby arrived at a wrong conclusion. That much as loss was occasioned to the Respondent; it was not caused by the Appellants.

On the other hand Counsel for the Respondent submitted that the two parties are neighbours and the Respondent knows the Appellants' cows very well, and it is not the first time they are

destroying the crops of the Respondent. That, the LC Chairperson PW3, also knew the Appellants' cows and the herdsman known as Godi. That the Appellants are trying to run from liability by denying their herdsman and relying on false evidence.

That the 1<sup>st</sup> Appellant admitted that his cows destroyed the crops of the Respondent and promised to settle the matter but never did. That, the Appellants' evidence is false because they knew that their daughter Patience was the one looking after the cows when they were returned by the Respondent after straying. That it was the Respondents' evidence that on both occasions he called for settlement of the dispute but the Appellant refused and it is not disputed that in 2011 the Appellant's cattle strayed into the Respondent's garden and destroyed his crops.

That the trial Magistrate was therefore right to hold that the Appellants' cattle had destroyed the crops of the Respondent and that the prosecution witnesses did not say they counted the cattle but rather estimated and failure to agree on the number of cows is a minor inconsistency.

That the 2<sup>nd</sup> Appellant did not testify in Court denying ownership of the Cattle. Thus, the trial Magistrate properly evaluated the evidence on record and came to the right conclusion.

In my opinion the learned trial Magistrate did not err in law and in fact when he held that the Appellant's cows strayed and destroyed the Respondent's maize garden. The Appellants' cattle were indeed responsible for the destruction of the Respondent's crops otherwise the 1<sup>st</sup> Appellant would not have allowed to go settle the matter much as he did not show up or he would have denied liability from the very start.

PW2 Nabasa Elias and PW3 Kaguma Christopher (LC Chairperson) all testified to the effect that it was the Appellants' cattle that had destroyed the Respondent's crops and PW2 even named some of the cattle according to their colours. It is therefore not possible that all the three people were mistaken as to who the owner of the cattle was, given the fact that they are even neighbours to the Appellants and the same cows have ever trespassed on the Respondent's crops. In as far as the inconsistency in the number of cows that strayed, I believe that is a minor inconsistency which does not go to the root of the case.

The Appellants want to skip liability by denying their herdsman by calling him a different name yet it is clear from the evidence of all the prosecution witnesses that the cattle was returned to the Appellants' herdsman. Therefore, the trial Magistrate properly evaluated the evidence on record and came to the right conclusion. The two grounds fail.

**Ground 3: That the learned trial Magistrate erred in law and in fact when he failed to take into account the principles of awarding damages.**

In the case of **Hall Brothers SS Co. Ltd versus Young [1939] 1 KB 748 at 756 (CA)**, damages were defined as;

*"The sums payable by way of damages are sums which fall to be paid by reason of some breach of duty or obligation, whether that duty or obligation is imposed by contract, by the general law or legislation."*

Counsel for the Appellants submitted that it is trite law that damage flows from liability where such liability is established. **(See: Eladam Enterprises Ltd versus Sas (U) Ltd & 2 others [2007] 1 H.C.B 37).** That the Respondent totally failed to establish liability which would then give rise to a claim for damages. Thus, the trial Magistrate erred in awarding UGX 732, 550/= for special damages.

That special damages should be specifically proved and pleaded which the Respondent did not do. That the Respondent was not entitled to costs for failure to serve a notice of intention to sue on the Appellants.

In the case of **Musoke versus Departed Asian's Property Custodian Board and Another, E.A.L.R [1990-1991] E.A 413** Justice Seaton held that;

*“Special damages are such a loss as the law will not presume to be consequences of the Defendant. It depends on the special circumstances of the case, must always be explicitly claimed in the pleadings and proved at the trial. It must be proved by evidence both that the loss was incurred and that it was the direct result of the Defendant's conduct.”*

On the other hand Counsel for the Respondent submitted that assessment of the damage to the crops was done by the Agricultural officer and a Report was made to that effect which is Exhibit PE1. And, the Respondent, led evidence to that effect. That the UGX 732, 550/= was specifically pleaded and proved. Thus, the trial Magistrate was right in awarding the special damages.

In my opinion the Respondent did plead the UGX 732, 500/= and led evidence to that effect and there is proof of the same which is a Report of the assessment of the damage by the Agricultural Officer. Thus, the trial Magistrate did not award the special damages in error.

As to costs, as per **Section 27** of the Civil Procedure Act, costs follow the event and are granted at the discretion of Court. Counsel for the Respondent submitted that the Respondent was under no obligation to serve the Appellants with a notice of intention to sue as per the provisions of the Advocates (Remuneration and Taxation of costs) Rules.

In my opinion the trial Magistrate took into account the principles of awarding damages and thus, the damages were not awarded in error and the Respondent was entitled to costs being the successful party in the suit.

This Appeal lacks merit and is dismissed with costs.

The right of appeal is explained.

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**OYUKO. ANTHONY OJOK**

**JUDGE**

**18/10/2016**

**Delivered in open Court the presence of;**

1. Both parties.
2. Counsel for the Appellant.
3. Counsel for the Respondent.
4. Court clerk