

TAFANANA MUKARAKATE
and
MRS POTE
and
JASPER MANYANGA
and
MRS MANYONGA
versus
TONDERAYI KUFAKUNESU

HIGH COURT OF ZIMBABWE
TAGU AND MUCHAWA JJ
HARARE, 21, 23 September & 13 October 2021

Civil Appeal

M.M. Macheke, for appellants
T. Nyamuwa, for respondent

TAGU J: This is an appeal against the whole judgment of the Magistrate wherein the court granted an order in favour of the respondent. The cause of action for which the respondent (then the plaintiff) had issued summons against the appellants (defendants in the court *a quo*) was a claim for RTGS \$243 005.00 being damages for malicious damage to property. The allegations being that sometime in or around the 3rd to the 8th of October 2019 the appellants (then defendants) had left their cattle unattended and they strayed into the respondent's wheat, maize and cabbage fields and grazed down, thereby destroying the crops causing damages to the tune of RTGS\$ 243 005.00.

After a full contested trial the court *a quo* granted judgment in favour of the respondent as claimed in the summons.

The grounds of appeal before this court are stated as follows that-

1. The court *a quo* erred by determining that it was the Respondents (*sic*) beats collectively which destroyed the Respondent crops when they were not.

2. The court erred when it failed to take into account the fact that from the period from June to end of October of every year it will be winter and beasts will be grazing alone without being looked after and it will be the responsibility of the owner of the field to secure his crops from the beasts to which the Respondent failed to do so.
3. The court *a quo* erred and misdirected itself in fact and in law when it failed to consider that the Respondent was at fault as he was negligent since he had not properly fenced his fields thereby allowing beasts to graze on his field.

The appellants prayed that the judgment of the Court *a quo* be and hereby set aside, that the claim by the respondent on summons be dismissed with costs.

The appeal is opposed by the respondent. After hearing submissions we reserved our judgment. The following is our judgment.

The issues for determination in this appeal is whether the court *a quo* erred and-

- a) Whether the Appellants' beasts collectively damaged the winter crops or not?
- b) If so, was the Respondent's fields properly secured and protected?
- c) Whether the area in question being Glensomert Plot, Macheke situate in the leafy province of Mashonaland East falls under commercial business model? and
- d) Is the quantum of damages claimed by Respondent, in the sum of RTGS \$243 00.00 or its equivalent to United States of America Dollars reasonably quantified and justifiable?

SUBMISSIONS BY THE PARTIES

Mr. *M.M. Macheke* for the appellants went to town submitting that the court *a quo* erred in finding that it was the appellants' beasts which collectively destroyed the respondent's crops. His contention was that the 3rd appellant should not have been included as he owned no beasts. He submitted that the respondent was at fault as his field was not secured and that during this period of the year cattle were free ranching. He further submitted that the respondent was at fault in that having seen the cattle in the field he left them there and went to report to the police. It was his contention that the respondent could have minimized the damage to the crops by removing them first and then go to make a report.

On the other hand Mr. *T. Nyamuwa* submitted that the court *a quo* did not err at all. In respect of the first ground of appeal he submitted that the 3rd appellant never said he never owned any cattle. He referred us to p 15 of the record where in their plea the appellants never said that the 3rd appellant did not own any cattle. In fact they disputed that it was their cattle that grazed the respondent's wheat, maize and cabbages as alleged. He further referred us to p 32 of the record where the respondent described the cattle of all the four appellants and this was not disputed. The following is the exchange before the court *a quo*-

“Q- How did you identify the cattle?”

A- I know 2nd defendant has a bull with a brown and white spots. She also has a black one that looks like a Buffalo. First defendant has a brown bull that has curved horns. He also has a heifer that is black and white. The 3rd defendant has a bull that is brown bull with a white face. 4th defendant has a brown bull with big horns. All these were in my field on that day.”

All these cattle were identified by color, horns and type.

As regards ground of appeal number two he submitted that the appellants were informed to keep beast all the time hence cattle were not supposed to be free ranching. This was not challenged. This again is captured on p 37 of the record where Muyengwa Munarwo the then headman said-

“Defendants' cattle grazed in the field. Plaintiff approached me saying that he intended to do a wheat project I then called for the 7 member committee and advised them that people should be called to be warned against straying beasts. People were called and were told to keep guard of their beasts. I also relayed the message to the demonstrator who took the message to the District level. Everyone was warned against letting the beasts straying. On the day in question the defendant's beasts destroyed the plaintiff's 4 string fence.”

The court *a quo* therefore did not err in holding that the appellants' beasts damaged the respondent's crops. Even in his submission the counsel for the appellants conceded that the other appellants' cattle may have damaged the crops save for 3rd appellant whom he said did not own any cattle. From his submissions some cattle were later removed from the respondent's field upon the arrival of the police and an AREX Officer.

THE LAW AND ITS APPLICATION

It is a settled position of our law that a person who domesticates animals is strictly liable for their upkeep if they stray into the property of another and cause damage to his or her pastures or crops. Professor G. Feltoe reiterates that if such harm is caused the owner or controller or

possessor will be delictually liable under *actio de pastu*. The action includes not only damage caused to the pastures by grazing but extends to harm caused by trampling on standing crops, plants or shrubs. See *A Guide to the Zimbabwean Law of Delict*, June 2017, by Professor G feltoe. This is a strict liability action. As said by the authorities it is trite that if the owner or controller of an animal has intentionally or negligently allowed his animal to cause harm to someone's pastures or crops, he will be liable for patrimonial loss caused. In our jurisdiction *Bwanya v Matanda* 2000 (1) 346 (H); *Valerie Jandles v George Mudanga* HH 178-16 and *Panhowe Farm (Pvt) Ltd v J. Mann and Company* HH 122-04 are *locus classicus* cases on the issue.

In this case we found no fault in the manner the court *a quo* reasoned in its judgment and the findings it made. The appeal therefore has no merit.

IT IS ORDERED THAT

1. The appeal is dismissed.
2. The appellants to pay respondent's costs on the ordinary scale.

MUCHAWA J Agrees.....

Mazani and Associates, appellants' legal practitioners
Laita and Partners, respondent's legal practitioners.