

H. TSIGA
and
PARKS AND WILDLIFE MANAGEMENT AUTHORITY
versus
KENNETH MUSANZIKA

HIGH COURT OF ZIMBABWE
MWAYERA & MUNANGATI-MANONGWA JJ
HARARE, 3 August 2017

Civil Appeal

Mr F Murisi., for the plaintiff
Mr A Nyamupfukudza, for the defendant

MWAYERA J: Upon considering the record of proceedings, heads of argument and hearing oral submissions in this appeal we upheld the appeal and made the following order that

1. The appeal hereby partially succeeds.
2. The order of the court *a quo* is set aside and substituted as follows:
3. The defendants' shall pay \$7 710 to the plaintiff.
4. Each party shall bear its own costs.

These are the reasons for our disposition. The respondent successfully instituted a claim for damages in the sum of \$10 000 in the court *a quo*. The basis of the claim was that the first appellant an employee of the second appellant had confiscated the respondent's kapenta. The kapenta was only released to the respondent at a later stage, when the kapenta had deteriorated in value.

The appellant sought to impugn the decision of the court *a quo* and raised 10 grounds of appeal as follows;

1. The court *a quo* erred in making a finding that the actions of first appellant in confiscating the respondent's kapenta reasonably was negligent, wrongful and unlawful when in actual fact, the first appellant acted correctly and lawfully in the circumstances.

2. The court *a quo* erred in making a finding of fact that the kapenta was handed back to respondent by the appellant in a bad state when in actual fact no evidence was led to prove that fact.
3. The court *a quo* erred on law in granting several damages claim in favour of the respondent that were all too remote from the actions complained of by the respondent.
4. The court *a quo* erred in failing to state its jurisdiction for granting the several claims by the respondent. The court thus erred in failing to come up with meaningful reason in support of its decision.
5. The court *a quo* erred in granting the respondent damages for travelling to and from Marongora as claimed in the summons despite that such a claim was exaggerated and unsupported by evidence on record.
6. The court *a quo* erred in granting the respondent's claim for money allegedly paid by the respondent as damages to his intended customer despite that no single evidence was ever lead to prove the said claim/payment.
7. The court *a quo* erred in granting the respondent claim for loss of fishing business despite the fact that such a claim was not substantiated by the evidence and it was clearly shown that there was nothing that should have stopped respondent from going on with his business in the circumstances.
8. The court *a quo* erred in granting the respondent s severally claims despite the fact that the plaintiff had not done anything to mitigate the damages/loss, even assuming that he was entitled to some damages.
9. The court erred in granting damages for wages when in actual fact the appellant were not responsible for the said claim, which was baseless and too remote.
10. The court *a quo* erred in failing to look analyze the evidence wholistically and in failing to state and explain how the respondent proved the damages he allegedly then suffered in the circumstances.
11. The court *a quo* erred in making a finding that the respondent managed to prove that he suffered damages claimed when in actual fact the respondent did not advance any evidence to prove his claims as per his summons and had not managed to prove its case on a balance of probabilities.

It is apparent on record the first appellant was employed by the second appellant. That the first appellant confiscated the respondent's kapenta is not in dispute. The court *a quo* pointed out that the first appellant was negligent in the manner he confiscated the kapenta breaking the seal thus exposing the kapenta which would resultantly affect the kapenta net mass and value. Given that the respondent had a fishing permit issued by the second appellant and that the permit allowed the respondent to buy and sell kapenta the actions of the first appellant on the night in question were unreasonable. To that extent one cannot find fault in the court's finding when it imputed liability on the first appellant and vicariously on the second appellant. The appellant impulsively impounded kapenta in circumstances where such confiscation was not warranted. The first appellant conceded in the court *a quo* that it was his first time to mount a road block. The courier over night express services company was mandated to carry goods authorised and legally authenticated by way of providing a road manifesto.

All documentation was in order and the police found no basis of impounding the vehicle. For the first appellant to have unjustified suspicion in such clear and straightforward circumstances even to break the seal was negligent and unlawful. These actions of the first appellant occasioned the claim of damages incurred by the respondent. There is clearly a close link between the first appellant's actions at the road block and the damages occasioned. Liability was established given the confiscation and breaking of seal caused damages in that the kapenta deteriorated in value and further the respondent had to make about 3 trips to Marongora before the exposed kapenta with broken seals was released to him. Sufficient evidence as regards the loss occasioned by the deterioration of kapenta could be ascertainable as kapenta was purchased at \$6.00 per kg and for 120 kg it would be \$740-00. When the kapenta was released because of exposure the value had gone down. It was no longer fit for consumption and the commercial purpose for which it was bought. The respondent incurred expenses in travelling to Marongora 3 times and he claimed transport costs as he used a hired vehicle.

All the other damages except damages for breach of contract to *bona fide* client or customers were anchored on evidence adduced. The damages were closely related to the irresponsible confiscation of the consignment by the first appellant. The total damages claimed could not be sustained on the basis that the other damages could not be supported by evidence. We

took into account the unsubstantiated damages of \$2 290 and thus reduced the claim to \$7710-00. It is with that observation that the other damages were not proven by evidence that we held that the appeal partially succeeds and thus set aside the court *a quo*'s decision to cater for the reduction in quantum of damages. Given the partial success of the appeal we considered it appropriate that each party bears its costs.

We accordingly ordered that:-

1. The appeal partially succeeds.
2. The order of the court *a quo* is set aside and substituted as follows:-

The defendant shall pay \$7 710 to the plaintiff.

3. Each party shall bear its costs.