

- iv. The learned trial magistrate erred in law and fact when she raised the standard of proof to that of satisfaction of court.
 - v. The learned trial magistrate erred in law and fact when she failed to evaluate evidence hence occasioning a miscarriage of justice.
2. The Appellant prays for orders that the judgment and orders of the trial Magistrate be set aside with costs here and in the lower court and judgment be entered in favor of the Appellant.
 3. The Appellant is jointly represented by Ms. Sandra Namagadde and Mr. Jimmy Lubaale of M/s. Ochieng Associated Advocates & Solicitors and the Respondent is represented by Mr. Stanley Kawalya of M/s. KMNN Solicitors & Advocates.
 4. Briefly the Appellant herein filed Civil Suit No. 72 of 2014 in the Chief Magistrates Court of Nabweru at Kasangati for orders and declarations that; (a) the Respondents were negligent in the manner they are rearing their dogs and are responsible for the death of the Plaintiff's four goats; (b) equivalent compensation for the four goats at the prevailing market price; (c) mandamus (i) compelling the district veterinary officer of Wakiso to kill all loose dogs roaming the villages; (ii) compelling all dog owners in the village to always chain their dogs during day time, that is 6:00am to 7:00pm; (d) punitive damages and costs of the suit.
 5. It is the Appellant's case that he was practicing zero grazing and keeping goats at his home. On 26th October, 2014, he had tied four goats near his home to graze. At about midday, a loose roaming dog allegedly belonging to the second Respondent but taken care of by the first Respondent attacked two of his big goats killing them instantly. One of the big goats had produced two kids which died due to starvation after a week. The Appellant chased after the dog which ran slowly towards the residence of the

Respondents which is about 4 kilometers away and on reaching, it went and rested at the verandah. The matter was reported to the area LC1 and later reported to police.

6. The Respondents filed a joint statement of defence in which they averred that the plaintiff was absolutely false and that while the second Respondent owned a farm in Kayebe, Gayaza, the first Respondent was not her employee or farm manager as alleged by the Appellant. Further that the second Respondent does not own any dogs, has never owned any residence or home in Kayebe Gayaza as alleged, she resides in Ggaba and she only owns a farm with goats in Kayebe and if she had dogs, it would be logically inconceivable that the said dogs would leave her farm which is full of goats to walk over a mile to the Appellant's homestead to kill his goats. Further that the Appellant's claim was fictitious and had been brought with the ill-intention of seeking unjust enrichment as the whole village of Kayebe is full of stray dogs.
7. At trial, the Appellant gave evidence and also called four other witnesses. Both Respondents also gave evidence and called one additional witness. In her judgment of 15th June 2017, Her Worship Katushabe Prossy found that ownership of the dog by the Respondents was not proved, it was not proved that the first Respondent was an employee of the second Respondent and dismissed the suit with costs. It is this decision that the Appellant is challenging.
8. In **Mulindwa Janies v. Uganda SCCA No. 23 of 2014**, the Supreme Court cited the **Nomensio Tiberangacase SCCA No 17 of 2007** and held that "it is a well settled principle that on first appeal the parties are entitled to obtain from the appeal Court its own decision on issues of fact as well as law. Although in case of conflicting evidence the appeal Court has to make due allowance for the fact that it has neither seen nor heard the witness. It must weigh the conflicting evidence and draw its own inference and conclusion."
9. In her assessment when concluding her discussion of issue two; whether the first Defendant is the second Defendant's farm manager and therefore making the

2nd Defendant vicariously liable for the alleged negligence; the learned trial Magistrate quoted **Behrens & Anor v. Bertram Mills Circus Ltd [1972] 2 QB 1** where LJ Delvindi discussed the principle of scienter to the effect that “ a person who keeps an animal with the knowledge of its tendency to do harm is strictly liable for the damage that it does if it escapes.” After this, she concluded the resolution of the issue thus; “that being the case, I resolve the second issue in the negative based on the fact that the Plaintiff failed to prove scienter and failed to also prove that the defendants had direct control over the dog which escaped and did harm to the Plaintiff’s goats.”

10. Considering the principle of scienter, though concerning liability for animals, does not concern vicarious liability for negligence. The trial Magistrate erred in law and fact when she imported the scienter standard in her assessment of this issue. Ground 1 is resolved in the affirmative.
11. It is also true that although she discussed vicarious liability of the second Respondent for the actions of the first Respondent, the trial Magistrate did not satisfactorily discuss negligence of the Respondents which was the Appellant’s cause of action. This was an error of law and fact. Ground 2 is also resolved in the affirmative.
12. Grounds 3, 4 and 5 will be determined jointly and in determining these grounds, I will make a fresh assessment of the evidence on record to determine whether the Respondents were negligent and thus responsible for the dog that bit the Respondent’s goats.
13. There is a contradiction regarding the number of dogs there were. The Appellant, PW2 and PW5 talk of two dogs; PW3 Kiyimba Ronald talks of one dog and PW4 Mipima Patrick talks of four dogs. When the Respondents took issue with the number of dogs on appeal, the Appellant clarified that there were two dogs and any mention of one dog anywhere was an error. PW5 also explained that there were two dogs, one was chased away and only one remained and ate the goats. PW5 seems to give us more detail and explanation regarding the dogs. I am more inclined to consider that

there were two dogs that attacked the goats in issue, one was chased away and only one remained. It was therefore only one dog that was chased and followed. I am also convinced from the evidence of the Appellant witnesses that there were two goats. However I am reluctant to believe the Appellant's singular evidence that one of the goats had two kids which starved to death when it died. That seems to be an exaggeration. Moreover from the picture tendered in evidence, I cannot say that the Appellant's goats were very fat to attract very high market value like fertile goats would.

14. Negligence was defined in **Blyth v. Birmingham Water Works Co. 11 Ex. 784**, to mean the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.”
15. The test to prove negligence was laid out in **Donoghue v. Stevenson [1932] AC 362** to wit; the Plaintiff has to prove (i) there existed a duty of care owed to the Plaintiff by the Defendant; (ii) the Defendant had breached that duty;(iii) the Plaintiff had suffered injury or damage as a result of the breach of duty. In this case in determining whether there existed a duty of care owed to the Appellant by the Respondents, vicarious liability of the second Respondent for the actions of the first Respondent had to be established.
16. It is not disputed that the Appellant's goats were bitten by a dog. The five Appellant witnesses testified to this. As a result the owner of such dog owed a duty of care to the Appellant by ensuring that his dog did not bite the Appellant's two goats. Both Respondents and DW3- Habyarimana Paskali explained that the first Respondent was an employee of Suubi Kulubya and not the second Respondent. The second Respondent categorically denied the first Respondent being her employee. Most important the Appellant adduced no evidence at all to demonstrate that the second Respondent was connected to the dog in issue. None of the Appellant witnesses can confirm that the first Respondent is an employee of the second Respondent. I

therefore have no basis to say that the second Respondent is culpable in any way for the actions of the dog in issue.

17. I will now turn to the culpability of the first Respondent. The first Respondent denies responsibility for the actions of the dog. He denies the dog in issue being his. DW3 Habyarimana Paskali at page 30 of the record of proceedings said that the Appellant went to their farm in 2014 asking if they had dogs on the farm. They told him that they did not have dogs on the farm and he left. The Appellant later returned and told them that he was going to the Chairperson to tell him that their dogs ate (bit) the Appellant's goats. In his cross examination at page 22 of the record of appeal, PW3 Kiyimba Ronald stated that "the dog is for the 1st defendant, I can't believe the dog is for D2 and we all know that the dog is for the 1st defendant." At page 24 of the record of appeal PW4 Mipima Patrick during cross examination stated that "the owner of the dog was a man we found at the farm. I know him by face and I know his name. I don't know about 2 dogs belonging to 2nd defendant." PW5 Nsereko Vincent at page 25 of the record of appeal during his examination in chief stated that "the time I have seen the dog it is for Walusimbi, I usually see him with it and even at the borehole." In his cross examination, he said "I have seen Walusimbi C.D.1 for so long with the dog. I knew that the dog was for Walusimbi."

18. The Appellant and the Respondents give divergent versions of the events. It is difficult to determine which version is true in determining the first Respondent's culpability. However there is something intriguing in the Appellant's final prayers. The Appellant sought the court among others (a) to issue mandamus compelling the district veterinary officer of Wakiso to kill all loose dogs roaming the village; (b) mandamus compelling all dog owners in the village to always chain their dogs during the day time, that is from 6:00am to 7:00pm. Implicit in these mandamus prayers is an acknowledgement by the Appellant that the village where the Appellant and the first Respondent stay is littered with stray dogs. For why would the Appellant be seeking such orders if stray dogs were not a problem in the area?

19. I therefore take it that the area in issue where the first Respondent and the Appellant live has a problem of stray dogs which are many and wreak havoc. In these circumstances, it is difficult to believe that the dog in issue belonged to the first Respondent to make him culpable in negligence as the Appellant wants. In circumstances where stray dogs are a problem in the area, it is also difficult to conclude that because a dog sits at the first Respondent's verandah after being chased by the Appellant, it therefore belongs to the first Respondent.
20. Moreover, if there were many stray dogs in the area and none of the Appellant's witnesses were neighbors of the first Respondent, it is difficult to believe the Appellant's witnesses' testimony that they knew the particular dog in issue to belong to the first Respondent. The fact that the dog rested after being chased for about 4kms which is the approximate distance between the Appellant's home where the goats were bitten and the first Respondent's residence where it rested, does not necessarily mean the dog belonged to the first or second Respondent.
21. Overall in the circumstances of this case I am not satisfied that the dog in issue was the dog for the first Respondent to make him culpable in negligence for the destruction occasioned on the Appellant's goats in issue. So after assessing the evidence on record for negligence, grounds 3, 4 and 5 are resolved in the negative and the appeal is dismissed. To avoid acrimony between the parties who are residents in the same village, I will not sanction the Appellant in costs in this court. The Appellant will only pay the Respondents' costs in the lower court.

I so order.

Lydia Mugambe
Judge
28th November 2018