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Njuguna v Wanjiku (Civil Appeal 4 of 2020)
[2022] KEHC 15159 (KLR) (23 June 2022) (Judgment)

Neutral citation: [2022] KEHC 15159 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CIVIL APPEAL 4 OF 2020

SN MUTUKU, J

JUNE 23, 2022

BETWEEN

STEPHEN NJUGUNA .... APPELLANT

AND

JOHN WAINAINA WANJIKU .... RESPONDENT

(Being an appeal against the judgment and decree of the Honourable Ruguru N(PM) made on 22nd January, 2020)

JUDGMENT

Introduction

1. John Wainaina Wanjiku, the Respondent, sued the Appellant in the lower court seeking general damages for pain and suffering and for loss of earnings, special damages in the sum of Kshs 170,208.00 interest and costs of the suit. In a judgment delivered on January 22, 2020, the lower court found in his favour and awarded him Kshs 700,000 for general damages and Kshs 170,208.00 for special damages interest and costs. The appellant was found 100% liable.
2. The appellant has been aggrieved by that judgment. He has preferred this appeal and has raised the following grounds of appeal:
   - i. The Learned Magistrate erred in law and fact in finding that the defendant 100% liable for assault.
   - ii. The Learned Magistrate erred in law and fact in not finding that the plaintiff failed to prove liability on the part of the defendant.
   - iii. The Learned Magistrate erred law and fact in disregarding the evidence of the defendant.
   - iv. The Learned Magistrate erred in law and fact in failing to analyze the evidence adduced.

v. The Learned Magistrate erred in law and fact in awarding excessive and exorbitant damages to the plaintiff.

3. The appellant seeks to have this appeal allowed with costs, the judgment and decree of the lower court be set aside and be substituted with an order dismissing the suit with costs.

Submissions

4. The appeal was canvassed by way of written submissions.

5. The appellant filed his submissions dated February 19, 2021 in which he has raised six issues for determination:

   i. Whether the learned trial magistrate erred in law and in fact in finding the defendant (appellant) 100% liable.

   ii. Whether the learned trial magistrate erred in law and in fact in not finding that the plaintiff failed to prove liability on the part of the defendant.

   iii. Whether the learned trial magistrate erred in law and in fact in disregarding the defendant's evidence.

   iv. Whether the learned trial magistrate erred in law and in fact in failing to analyze the evidence adduced.

   v. Whether the learned trial magistrate erred in law and in fact in awarding excessive and exorbitant damages to the Plaintiff.

   vi. Who should bear the costs of this appeal.

6. The appellant submitted that the learned trial magistrate erred in law in finding him 100% liable for the assault; that he provided an alibi that on the material day he was at home nursing a bad leg infection, which evidence was not shaken even on cross-examination; that this evidence was corroborated by his wife and Joseph Titus Cheres, a clinical officer practicing in Kiserian and that the evidence was not controverted by the plaintiff and his witnesses.

7. The appellant cited *Palace Investment Ltd -vs- Geoffrey Kariuki Mwenda & another* [2015] eKLR on the issue of burden of proof. He argued that it was a dark night and there was no light at the scene and therefore it was impossible for the plaintiff to identify the attacker as the appellant. He submitted that there were no witnesses at the scene of crime to corroborate the respondent's testimony.

8. The Appellant relied on section 109 and 112 of the *Evidence Act* on the burden of proof and argued that the respondent failed to prove liability on the part of the appellant. He cited *Timsales Ltd v Willy Ng'ang'a Wanjohi* [2006] eKLR where it was held that

> " ....it is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and his injury. The plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence. An injury per is not sufficient to hold someone liable."

9. On whether the learned trial magistrate erred in law and in fact in awarding excessive and exorbitant damages to the plaintiff, the appellant submitted that the learned magistrate did not appreciate the facts of the case and proceeded on wrong principles hence the inordinate high damages to the respondent.

10. He cited *GA (minor suing through her father and next friend BZ) -vs- Paul Muthiku* [2020] eKLR, where the court stated that:

> " ....In assessing general damages, courts must have presence of mind to ascertain the sum of general damages that other courts and especially appellate courts would ordinarily award in respect of a particular injury. A plaintiff's compensation ought to be comparable to awards by other courts for comparable injuries. In view of the aforesaid, a court must therefore be guided by precedents."

11. The appellant also cited *GA (Minor suing through his father and next friend BZ) v. Paul Muthiku*, cited above; *Francis Ochieng & Another v. Alice Kajimba* [2015] eKLR; *Francis Ndungu Wambui & 2 others v Benson Maina Gatia* [2019] eKLR and *Telcom Orange Kenya Limited v I S O minor suing through his next friend and mother JN* [2018] eKLR where general damages awarded ranged between Kshs 280,000 to Kshs 500,000.

12. As regards special damages he submitted that the learned magistrate erred to award the damages yet the same were not strictly proved. He cited *Christine Mwigina Akonya v Samuel Kairu Chege* [2017] eKLR, where the court stated, inter alia, that special damages must be both specifically pleaded and strictly proved before they are awarded.

13. On costs, he submitted that costs follow cause and prayed that costs be awarded to the winning party. He urged that the appellant has successfully demonstrated his case and therefore the appeal should be allowed with costs.

14. The respondent filed his submissions dated April 25, 2022.

15. On the ground that the learned magistrate erred in law and in fact in finding the defendant 100% liable for assault, the respondent submitted that he testified that he was standing at the gate, when he took his phone to call his employer to open the gate when he saw the appellant approached him together with his employee, and suddenly hit with a wooden bar that had nails. He submitted that the time was 8pm and that the place was lit and that this evidence was uncontroverted by the appellant.

16. On the second ground of appeal, he submitted that he called 4 witnesses who corroborated the evidence that he was hit by the Appellant. That further the appellant was charged in criminal case number 668/2019 with grievous harm contrary to section 234 of the *penal code* and that the trial magistrate was right in finding the appellant liable based on the evidence adduced.

17. On the third ground of appeal, it was submitted that the appellant failed to convince the court that he did not assault the respondent; that the trial court took into consideration both the appellant's and the respondent's evidence in arriving at its decision.

18. The respondent further submitted that there is evidence of the fact that the appellant attacked him and that he was with his worker when this happened; that the appellant did not call his work as a witness to dispute the respondent's evidence and the Appellant's medical report that is dated September 27, 2015 to 15/10/2015 was procured to defeat the ends of justice and that is why the Honourable magistrate found the appellant liable on a balance of probability.

19. He submitted that he proved special damages amounting to Kshs. 168,458/- as shown in the Kenyatta National Hospital invoice, which bears the hospital stamp and shows the date of admission and that the appellant did not challenge the production of the invoice and receipt at trial. The respondent relied on the case of *Pestony Limited & another -vs- Samuel Itonye Kagoko* [2022] eKLR to support the point that the appellant did not challenge the production of the invoice from the hospital.

20. On the issue of excessive and exorbitant damages, it was submitted that respondent's witness 3, Dr. Joseph Maundu, testified on the injuries sustained by the respondent which included: head injury, healed scar of the head, extradural hemorrhage and that he had been operated on to prevent blood clots; that the injuries were assessed as grievous harm; that the evidence was also corroborated by his testimony; that he relied on a number of cases at trial and pleaded for a sum of Kshs. 2,500,000/- as general damages and the court awarded Kshs. 700,000/-. It is his case that the amount awarded was not exorbitant.

Determination

21. It is my duty sitting on this first appeal to re-evaluate and re-consider the evidence afresh to arrive at my own conclusion. I did not observe the witnesses testifying and I give allowance for that.

22. The evidence adduced in the lower is straight forward. The respondent was going back to work at his employer's place at around 7.45pm when he saw the appellant and his worker called Simon. Both were known to him. At that time, the respondent was picking his phone to call his employer, karanja, to open the gate for him. he was attacked by the appellant, was hit on the head with a piece of timber with nails on it. The respondent told the court that after being hit, simon told the appellant that the Respondent was not the person they were looking for.

23. The respondent testified further that he fell down and that the appellant and Simon left him at the scene. He testified that the two returned after 10 minutes, both lifted him from the road and dumped him at a farm. He said he lost consciousness and when he came to, he found himself at Kenyatta National Hospital in Intensive Care Unit (ICU). He testified that the Appellant offered to pay his hospital bill but he did not do it.

24. On cross examination, the respondent testified that there was security lights at the scene and reiterated that he knew the Appellant very well.

25. The respondent was rescued in the morning by Gerald Muiya Maina and taken to hospital. Gerald corroborated the evidence that the appellant offered to pay medical expenses for the respondent.

26. That the respondent was injured on the head was confirmed by the late Dr. Joseph Maundu who told the court that the respondent sustained severe head injuries affecting the brain which could result in epilepsy, convulsions, memory loss and weakness on left side of the body.

27. I have read the evidence adduced by the appellant. His defence is alibi to the effect that he was sick and unable to walk. He denied knowing the respondent until he saw him at the police station.

28. I have considered this appeal. The law places the burden of proof on the plaintiff to prove his case. In the case before the lower court, the evidence shows that the respondent knew the appellant very well. He saw him that night with Simon his worker. There was light at the place. There is also evidence, which I find uncontroverted, that the appellant offered to pay the respondent's medical bill. the respondent and Gerald Muiya Maina testified to this. The standard of proof is on a balance of probabilities.

29. The assault on the respondent was unprovoked. Going by the evidence, it seems as if the Appellant had mistaken the Respondent for someone else. On my own consideration, I find that on a balance of probabilities, the respondent proved his case against the appellant. It is my finding that his alibi defence was an afterthought in an attempt to exonerate himself. His offer to pay the respondent's medical bill further shows his involvement.

30. The respondent did not play any role to attract the wrath of the Appellant. This places the blame squarely on the appellant and for that reason the trial court did not commit any error in finding him 100% liable.

31. It is not true that the trial magistrate disregarded the appellant's evidence. I have read the judgment of the lower court. Pages 4 and 5 of that judgment discusses defence evidence. The trial court stated as follows in respect of the defence evidence:

> "I find the defendant's evidence very weak and does nothing to water down that of the plaintiff. The defendant in his own evidence told the court that he saw a vehicle arrive at the scene and take the plaintiff to the hospital………"

32. The trial court stated that "I did not read any malice from the plaintiff that would have occasioned him to institute a false claim against the defendant. The defendant's claim that, his daughters were using the plaintiff to harass him is unbelievable. The quoted land dispute by the defendant is between him and his daughters. The plaintiff is not a party to the suit and it was not demonstrated how he could be used by defendant's daughters in the instant case."

33. The above reasoning by the trial court rends credence to the fact that the trial magistrate did not fall into error. She considered the defence case and after proper analysis of both sides of the matter before that court arrived at a conclusion that the plaintiff had proved his case to the required standard.

34. Did the trial court award excessive and exorbitant damages to the plaintiff?

35. I have considered this ground of appeal and the rival submissions on it. I have noted the injuries sustained on the respondent. I have considered that the appellant was not provoked in any manner. He attacked the respondent, who was minding his own business for no apparent reason. I have seen the conclusions of the doctor on the injuries and I am satisfied that basing my reasoning on these factors, the award of damages is not excessive in the circumstances.

36. I have noted that trial court was alive to this issue and made comparisons with other cases and arrived at the amount awarded.

37. Having take time to fully appreciate the case for the appellant and that of the respondent, and having read the entire lower court record, the record of appeal, grounds of appeal and submissions of both sides, I see no reason to disturb the findings of the lower court. The grounds of appeal have no basis.

38. Consequently, this appeal has no merit and is hereby dismissed with costs to the respondent. It is so ordered.

Dated, signed and delivered this 23rd June 2022.

S. N MUTUKU

JUDGE