



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO.43 OF 2020

GILBERT MUSEMBI.....APPELLANT

VERSUS

1. JOSEPH KALOKI KULA

2. ANTONY WANGUYA.....RESPONDENTS

(Being an Appeal from the Judgment of Hon. G. Kiage (SRM) delivered

on the 20th February, 2020 in Mombasa Civil Suit No. 2474 of 2011)

JUDGMENT

1. The Appellant was the Plaintiff in **Mombasa CMCC No.2474 of 2011** and filed a **Plaint** on the **1st November, 2011**. The particulars of the case were that on or about the **31st October 2010** at Makutano Bar in Shanzu, the Respondents severally, jointly, wrongfully and illegally assaulted the Appellant by beating him with fists and slaps, a result of which the Appellant sustained severe personal injuries and suffered loss and damage.

2. The Appellant stated that he suffered blunt object injuries *on the forehead (left periorbital region), the lower back (lumber) and the left eye with inflammation (traumatic conjunctivitis)*, which he contended that the Respondents were strictly liable for and thus sought from the trial court an award of *general damages, special damages of Kshs.2,000/= and costs plus interest as against the Respondents.*

3. In his defence, the 1st Respondent responded by way of a **Defence** filed on the **4th August, 2017** while the 2nd Respondent did not participate in the suit before the trial court.

4. In his Defence, the 1st Respondent denied that on the **31st October, 2010** he severally, jointly and illegally assaulted the Appellant by beating him with fists and slaps. He further denied that the Appellant sustained any severe injuries, loss and damage as was alleged.

5. It was further the 1st Respondent's contention that he was never served with a notice of intention to sue as the same was directed to the O.C.S, Bamburi Police Station for which he asked the trial court not to award costs to the Appellant.

6. In his Defence, the 1st Respondent stated that the suit was an abuse of the court process as no statutory notice was issued to the Attorney General as required under **Section 12** of the **Government Proceedings Act** since the cause of action as against the him arose while he was in the course of his duties as a Police officer. The 1st Respondent thus challenged the capacity and manner in which he was sued.

7. Further, the 1st Respondent's case was that the Appellant had been lawfully arrested after a complaint was lodged against him vide **OB No.2/1/11/2010**. The 1st Respondent stated that the Appellant complained of assault, a criminal offence that ought to have been prosecuted through a criminal process or by instituting private prosecution in order to prove a charge of assault.

8. At the hearing the Appellant called 2 witnesses while the 1st Respondent called one witness.

9. PW1 was **Dr. Ajoni Adede** who testified that he made a report **dated 27th April, 2011** in respect of the Appellant who had been assaulted by unknown persons. He stated that he relied on treatment notes from Coast Provincial General Hospital which the Appellant presented.

10. It was PW1's evidence that he was paid Kshs.2,000/= for the report and Kshs.5,000/= for his attendance in court.
11. On cross-examination PW1 stated that he relied on treatment notes from Coast Provincial General Hospital which confirmed that the Appellant had sustained soft tissue injuries.
12. The Appellant testified as PW2 and stated that he was assaulted on the **31st October, 2010** by the Respondents at a bar in Shanzu whereby he sustained injuries.
13. PW2 testified that he had purchased some bed sheets from Jane, who later stole them. That he went to Makutano bar to look for the said Jane, whom he found and the clothes were returned to him. He went on to state that the said Jane went out, and returned in the company of two men who descended on him and assaulted him. He stated that he sustained injuries on the left side of his face and back as a result of this assault.
14. It was PW2's further testimony that the two men took him to Bamburi Police Station where he was kept in a cell for one night and upon being released, he went to Coast General Hospital where he was treated and was issued with treatment notes. After his treatment, PW2 told court that he went to Bamburi Police Station where he recorded a statement and was issued with a P3 form which was again filled at Coast General Hospital.
15. Further, PW2 stated that after he received the P3 form from the police, he went and contacted an Advocate. He also went to **Dr. Adede** who examined and prepared a medical report for him. He further testified that he was fully recovered and was not in pain.
16. Lastly, PW2 testified that he thought his assailants were crooks since he did not know them before the attack.
17. On cross-examination, PW2 stated that he was assaulted on **31st October, 2010**. That he had bought clothes from one lady by the name Jane, who later stole them from him. He stated that he did not have an OB report for the theft of his property. He also testified that he was arrested at night on the **31st October, 2010**, and the people who assaulted him were in civilian clothing. He stated that after the arrest, he was taken to Bamburi Police Station where he was released the following day on a police bond of Kshs.5,000/=. He, however, added that the fact that he was released on a police bond was not in his statement. It was PW2's further testimony that he could not recall the OB number off the top of his head from the report that he made of the assault to the Police Station. He also testified that the assault occurred at Makutano Bar in Shanzu, where there were other people but he did not call any eye witness from the bar. PW2 stated that he was assaulted a few minutes to midnight but the P3 form indicated that the assault occurred at 10.50 pm. He further testified that an OB number was recorded on the **2nd November, 2010**. The Appellant's further evidence was that he brought the case against the Respondents as private citizens but admitted that the demand letter was addressed to the OCS, Bamburi Police Station. Lastly, he stated that he was not aware of whether or not the Respondents were ever charged for the assault.
18. The 1st Respondent **No. 39099PC, Joseph Kaloki** who was stationed at Lungalunga police station testified as DW1. He stated that on the **1st November, 2010**, he was on duty at Bamburi Police Station when a call came in with information that there was an issue at Makuti Bar in Shanzu.
19. He went on to state that one **Lucy Wairimu** had complained that she had been attacked at Makuti Bar. That the 1st Respondent and a colleague then proceeded to Makuti Bar where the complainant identified the Appellant as her assailant, to whom they identified themselves by showing his service ID cards and took him to Bamburi Police Station.
20. It was DW1's testimony that at the station, the Appellant was placed in the cells while he went about his normal duties after. He testified that when he reported to work on the **1st November, 2020**, he learnt that the Appellant had been released by the OCS on a police bond.
21. DW1 testified that he was never served with a demand letter for the assault that the Appellant claims occurred on the **31st October, 2020** but instead the letter was served on the OCS, Bamburi Police Station. He stated that he was not charged in any criminal case on any allegation of assault. He then added that if at all he arrested the Appellant, it was in the course of his duties as a Police Officer.
22. On cross-examination, DW1 confirmed that he was attached to Bamburi Police Station when he received a call with regard to the incident on the **1st November, 2020** at about 12 O'clock midnight and he proceeded to the location of the said incident in his civilian clothes, where he identified himself to the Appellant and proceeded to arrest him. He testified that the Appellant did not resist arrest.
23. The 2nd Respondent did not call any witness to testify or evidence.
24. After hearing the parties in their evidence, the trial Court delivered its Judgment on the **18th February, 2020** and dismissed the Appellant's suit on the ground that he had not made out a case to warrant the issuance of the orders sought.
25. Upon being dissatisfied with the findings of the trial court in the Judgment dated **18th February, 2020**, the Appellant filed an appeal before this Court and raised the following grounds: -

1. THAT the Honorable Court erred in law and in fact by failing to consider the testimony of the Appellant witness who testified in court.

2. THAT the Honorable Court erred in law and in fact in

dismissing the Appellant's case without properly evaluating the evidence he gave in support of his case and arrive at a correct conclusion.

3. THAT the Honorable Court erred in fact and in law by failing to take judicial notice and considering the express provisions of the Evidence Act.

4. THAT the Honorable Court erred in fact and in law by failing to consider the submissions of the Appellant herein.

5. THAT the trial court erred in law and in fact by failing to award costs to the Appellant instead awarding the same to the 1st Respondent.

6. THAT the Honorable Court erred in law and in fact by failing to award special and general damages to the Appellant which was unnecessary.

7. THAT the trial Magistrate erred both in law and fact by failing to consider the circumstances of the matter and the fact that there was obvious use of excess force on the Appellant.

8. THAT the trial Magistrate erred in law in fact by failing to appreciate the law and specifically Article 28 of the Constitution and arrive at the conclusion that by assaulting the Appellant the Respondents abused the Appellant's inherent dignity as a Human being.

9. THAT the trial Magistrate erred in law and in fact by misinterpreting the National Police Act which led him to unreasonably exonerating the Respondents.

26. The Appellant prayed that the appeal be allowed, that the trial court's Judgment be set aside and this court do enter Judgment for special damages and assess general damages for the Appellant as against the Respondent. He further prayed that this court awards him the costs of this Appeal.

27. Directions were then issued on the **8th February, 2020** that the appeal be canvassed by way of written submissions. Accordingly, parties complied and filed their respective submissions. The Appellant filed his submissions on the **9th April, 2021** while the 1st Respondent filed theirs on the **13th May, 2021**.

28. The 2nd Respondent did not participate in the Appeal herein despite being served with several notices to appear before court. He did not file any written submissions before this court.

29. Parties opted to rely on their written submissions in their entirety.

The Appellant's Written Submissions

30. It has been submitted by the Appellant that there was no proof tendered before the Lower Court to ascertain the reasons for the arrest of the Appellant. It has been stated that the Respondents never proved before the Honorable Court that indeed they were acting in the course of their duty when they arrested the Appellant and there were no charges levelled against him.

31. The Appellant has also submitted that under **Section 61** of the **National Police Service Act No.11A of 2011**, the use of violence is prohibited. However, a Police officer is statutorily allowed to use force only in certain conditions, and the force ought to be proportionate with the seriousness of the offence, and the resistance by the person against whom it is used. The Appellant stated that DW1 testified that there was no resistance of the arrest and thus there was no justification of the Respondents' use of excessive force.

32. According to the Appellant, the trial Magistrate erred in law and fact by failing to consider the evidence and testimony of the Appellant together with submissions and dismissed his suit when he had been subjected to physical and psychological suffering contrary to **Articles 28** and **29** of the **Constitution of Kenya**.

33. It has been submitted that the trial Court was wrong in dismissing the Appellant's suit on the ground that the Respondents were not the proper parties to be sued as the technicality could be cured by Article **159(2)(d)** of the **Constitution** as read with **Order 1 Rule 9** and **Rule 10(2)** of the **Civil Procedure Rules**. He has further supported this point by placing reliance on the cases of **Margaret Atekha & Another –vs- Rift Valley Railways Limited & Another [2020]eKLR**, **P C Desai –vs- Navin M Patel T/A Sandpipers Constructions & Civil Engineering Services & 13 Others [2001]eKLR** and **Jiwa –vs- Jiwa & Another [1990]eKLR**.

34. Further, it is the Appellant's submissions that during the proceedings before the trial court, he proved his case on a balance of probabilities as required and showed that he indeed suffered injuries as a result of the Respondents' use of excessive force. The Appellant has thus prayed that his Appeal be allowed with costs and the Judgment of the trial court be set aside and he be awarded damages for physical pain and suffering.

The 1st Respondent's Submissions

35. It has been submitted by the 1st Respondent that it is uncontroverted that the Appellant was aware that the Respondents were Police Officers because although in civilian clothing, they identified themselves as such. It is thus the 1st Respondent's case that the trial court was right to conclude that the Appellant was aware that the Respondents were Police Officers.

36. The 1st Respondent has submitted that he and the 2nd Respondent were on duty when they arrested the Appellant and that there was no sufficient proof before the trial court that the Appellant was assaulted. They also submitted that there was no other independent witness who corroborated the Appellant's allegation that he was assaulted by the Respondents.

37. It has been submitted that the Appellant's Pleint before the trial court was incurably defective for failure to enjoin the National Police and Inspector General from whom the Respondents get their instructions. Further, the Appellant ought to have also sued the Attorney General who is the National Police legal advisor.

38. The 1st Respondent has also stated there is no report of assault that was made by the Appellant at Bamburi Police Station. He added that if indeed the alleged assault occurred, the Respondents would have been investigated and duly charged in a criminal court, but the same is not the case herein.

39. Further, it has been submitted that the court should ignore the Appellant's submissions on breach of constitutional rights as the same was not raised before the trial court.

40. The 1st Respondent has urged the court not to allow the Appeal and maintain the Judgment of the trial court as the failure to enjoin the National Police Service and the Attorney General was fatal that it could not be cured by **Article 159** of the **Constitution**.

Analysis and Determination

41. This being the first Appeal, this Court has a duty to re-evaluate and analyze the evidence in detail and come up with its own conclusions while bearing in mind that it neither saw the witnesses nor heard the evidence when the parties were testifying so as to see their demeanour. (See the Court of Appeal case of **PIL Kenya Ltd –vs- Oppong [2009] KLR 442**).

42. I have carefully considered the pleadings and submissions filed herein and find the issues for determination being as follows: -

i) Whether the Respondents are Police Officers, and if so can they be sued in their personal capacity.

ii) Whether the Appellant is entitled to the orders sought

i) Whether the Respondents are Police Officers, and if so can they be sued in their personal capacity

43. The suit before the subordinate court arose from the allegations that the Appellant was allegedly assaulted by the Respondents who he believed were crooks and as such sought for damages for pain and suffering. When the matter was heard before the trial court, it was found that the Respondents were Police Officers who had acted in the course of their duty under the **National Police Service Act No. 11A of 2011** and as such ought not to have been sued in their own capacity. The trial court thus dismissed the Appellant's claim, a result of which the Appellant filed the instant Appeal.

44. The Appellant does not agree with the trial court's finding and has stated that the Respondents can be sued in their personal capacities. He goes on to aver that the lack of joinder of the National Police Service and the Attorney General was a technicality that could be cured by **Article 159(2)(d)** of the **Constitution** as read with **Order 1 Rule 9** and **Rule 10(2)** of the **Civil Procedure Rules** on joinder and misjoinder of parties.

45. It is clear from the Appellant's submissions at paragraph one on page 3 that he was aware that the Respondents were Police Officers who he claims battered him by raining fists, slaps and blows on him on an allegation that he had stolen goods. Further, it is clear that the Appellant admits that he was arrested on allegations of stealing and was taken to the Police Station where he was released on a Police Bond. Thus, it is evident that the Respondents acted in their capacity as Police Officers who arrested the Appellant in the course of their duties as affirmed by **Section 45** of the **National Police Service Act No.11A of 2011**, which provides: -

Officer deemed to be on duty

“A police officer shall for the purposes of this Act, be considered to be always on duty when required and shall perform the duties and exercise the powers granted to him under this Act or any other law at any place in Kenya where he or she may be deployed.”

46. From the evidence on record, it has been established that the Respondents were Police Officers who arrested the Appellant in the line of duty and as such protected from personal liability as provided under **Section 66** of the **National Police Service Act No.11A of 2011** which states that : -

Protection from personal liability

(1) No matter or thing done by a member, employee or agent of the Service shall, if the matter or thing is done in good faith for the performance and execution of the functions, powers or duties of the Service, render the officer, employee or agent personally liable to any action, claim or demand whatsoever.

(2) Subsection (1) shall not preclude a person from bringing legal proceedings against the Inspector-General in respect of an act or omission of the kind referred to in that subsection if the person can satisfy the court that the police officer or other person would, but for that subsection, have incurred liability for the act or omission.

47. The above Section provides that if a party is to institute legal proceedings against the Police, the same should be brought against the Inspector-General in respect of any act or omission. The question then becomes, who represents the Office of the Inspector-General in legal proceedings.

48. The Office of the Inspector-General is a state office as defined under **Article 260** of the **Constitution of Kenya** which provides: -

“State”, when used as a noun, means the collectivity of offices, organs and other entities comprising the government of the Republic under this Constitution;

“State office” means any of the following offices—

a) President;

b) Deputy President;

c) Cabinet Secretary;

d) Member of Parliament;

e) Judges and Magistrates;

f) member of a commission to which Chapter Fifteen applies;

g) holder of an independent office to which Chapter Fifteen applies;

h) member of a county assembly, governor or deputy governor of a county, or other member of the executive committee of a county government;

i) Attorney-General;

j) Director of Public Prosecutions;

k) Secretary to the Cabinet;

l) Principal Secretary;

m) Chief of the Kenya Defence Forces;

n) commander of a service of the Kenya Defence Forces;

o) Director-General of the National Intelligence Service;

p) Inspector-General, and the Deputy Inspectors-General, of the National Police Service; or

q) an office established and designated as a State office by national legislation;

49. Under **Article 156** of the **Constitution** the Government or a State Office is represented in legal proceedings by the Attorney General whose functions *are inter-alia*;

“1) ...

2) ...

3) ...

4) The Attorney-General-

a) is the principal legal adviser to the Government;

b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and

c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.”

50. It is now established that Inspector-General's office is a state office under the Government, and for any civil proceedings to be brought against it, **Order 1 Rule 11** of the **Civil Procedure Rules** provides that parties should be guided by **Section 12** of the **Government Proceedings Act** which provides: -

Parties to proceedings

(1) Subject to the provisions of any other written law, civil

proceedings by or against the Government shall be instituted by or against the Attorney-General, as the case may be.

51. I therefore, do not agree that misjoinder of the Inspector-General of Police and the Attorney General is a technicality that can be cured by **Article 159(2)(d)** of the **Constitution** as read with **Order 1 Rule 9** and **Rule 10(2)** of the **Civil Procedure Rules** as alluded to by the Appellant. **Section 12** of the **Government Proceedings Act** makes it mandatory that a state agency be represented by the Attorney-General.

52. As shown herein, it was thus paramount that the Appellant sue the Inspector-General of Police and its legal adviser, the Attorney-General, and hence agree with the trial court that the Respondents herein were not the proper parties in the suit.

ii) Whether the Appellant is entitled to the orders sought

53. The Appellant contends to have been assaulted by the Respondents who he stated used excessive force by beating him with fists and slaps thus filed a suit before the trial court seeking general damages, special damages of **Kshs.2,000/=** and costs of the suit plus interest.

54. The 1st Respondent on the other hand responded by stating that the Appellant had not proved the tort of Assault to the required standard of law, thus Should not be granted the orders as sought.

55. **In Kenya, Assault is criminal in nature and provided for under The Penal Code, Chapter 63 of the Laws of Kenya. There are** various types of assaults under **Chapter XXIV** thereof, that is from **Sections 250 to 253** inclusive. The said Chapter provides for the offences of Common assault, Assault causing actual bodily harm, insulting modesty by forcible stripping and assault on persons protecting wreck among other assaults.

56. It was therefore important that the Appellant show that he had reported the said assault to the Police, recorded a statement and criminal proceedings instituted against the Respondents who would then be tried and either found guilty of assaulting him beyond reasonable doubt or acquitted for the offence.

57. In this suit, the Appellant only attached a **P3 form** to show that he was assaulted but it is not clear, even from the said P3 form, who he claims committed the assault against him. Further, the Respondents herein have not been found guilty of assault in a criminal court to warrant the institution of civil proceedings against them as a result thereof. It was paramount that the Appellant provides before court concrete evidence to the claims of assault against him as the law is clear that he who asserts must prove.

58. It is thus very evident that the trial court took into account the Appellant's witnesses evidence, evaluated the said evidence and considered his submissions to arrive at the conclusion that the Appellant's case had not been proved on a balance of probabilities to warrant the grant of the orders sought, a finding this court agrees with.

59. This court finds that the questions raised by the Appellant in regard to **Article 28** of the **Constitution of Kenya, 2010** and use of excessive force were not raised before the trial court for determination, hence the same cannot be raised on Appeal for determination the first time. In the circumstances, the same will not be determined.

60. In view of the above findings, I am not persuaded that the trial court fell into any error in dismissing the Appellants suit.

61. The upshot is that the Appellant's Appeal dated **19th March, 2020** is hereby dismissed with costs to the 1st Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF OCTOBER, 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

No appearance for and by either party

Court Assistant - Gitonga