REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 69 OF 2019

JOSEPH KIBITI M'INOTI.....APPELLANT

VERSUS

MIRIAM KANYUA ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon. J. Irura, PM made in Nkubu PMCC No. 135 of 2011 on 20/3/2018)

J U D G M E N T

1. By a plaint dated 28/11/2011, the respondent alleged that on 18/10/2005, the appellant had assaulted her as a result of which she sustained serious injuries. That the appellant was subsequently charged and convicted. She prayed for general damages against the appellant.

2. The appellant denied the respondent's claim vide a defence dated 8/3/2012 and counterclaimed against her for injuries that were allegedly inflicted upon him by the respondent on 18/10/2005.

3. After trial, the trial Court found for the respondent and awarded her damages of Kshs.600,000/- and dismissed the appellant's counterclaim.

4. The appellant was aggrieved by that decision and has appealed to this Court setting out 8 grounds of appeal. These grounds can be summarized as; ***that; the trial Court erred in holding the appellant 100% liable for the injuries sustained by the respondent, the trial Court erred in failing to consider the appellant's counterclaim and that the award of Kshs.600,000/- was excessive in the circumstances.***

5. As a first appellate Court, this Court is enjoined to re-consider and reassess the evidence afresh and come to its own independent findings and conclusions. In so doing, however, the Court must consider that it did not see the witnesses testify. **See Selle & Another v. Associated Motor Boat Co. & Others [1968] EA 123.**

6. The appellant and the respondent were the only people who testified before the trial Court. They both filed witness statements and documents on which they were cross-examined.

7. The respondent's case was that, on 18/10/2005, she was at her home when she was attacked by the appellant who was armed with a metal bar. She run away to her kitchen but the appellant picked her panga and pursued her there. He thereupon cut her on the wrist joint, on her face and on her right hand. She was rescued by her son. She was later treated but she is unable to make use of her right hand. The appellant was charged with the offence of assault in **Nkubu Criminal Case No. 579 of 2006** and convicted. She produced a medical report that assessed her at 25% incapacity and the Judgment of the criminal Court. She denied having assaulted the appellant as claimed by him.

8. On his part, the appellant stated that the respondent and her sons had cut him on the head. He denied having assaulted the respondent but asserted that it is her sons that had cut her. He admitted that he had not taken any action against her but he had been charged and convicted of assaulting her. He had not appealed against that decision. He also produced a medical report to prove the injuries he had suffered.

9. The appellant's advocates filed submissions on his behalf. They argued grounds 1 and 2 together, ground 3 separately and grounds 4 to 8 together. They submitted that the appellant's counterclaim was not considered. That the respondent had contributed to her injuries and the conviction in the criminal case was not proof that the respondent did not contribute to her injuries. The cases of **Robinson v. Oluoch [1971] EA 376** and **Dilip Asal v. Herma Muge 7 Another [2001] eKLR** were cited in support of those submissions.

10. It was further submitted for the appellant that the award of Kshs.600,000/- was manifestly excessive. That the trial Court failed to consider the principles applicable in awarding damages. The case of **Morris Mugambi & Another v. Isaiah Gitiru [2004] eKLR** was cited in support of that contention.

11. The first ground was that the trial Court erred in holding the appellant 100% liable for the injuries suffered by the respondent. I have

already set out above the evidence that was before the trial Court. According to the respondent, it is the appellant who assaulted her. She narrated how the appellant pursued her from her gate all the way to her kitchen whereupon she inflicted on her the injuries complained of.

12. While the respondent was graphical in her evidence on what transpired, not so with the appellant. His written statement which he adopted at the trial was lacking in detail and material. The entire statement was simply as follows:-

> ***"I come from Mariene Location, Meru Central District. I am a farmer.***
>
> ***I have sued the plaintiff as pleaded in my statement of defence and counterclaim. I am seeking general and special damages costs and interest from the defendants (sic).***
>
> ***That is all".***

13. In the defence and counterclaim which the appellant adopted as his evidence, the appellant only denied the respondent's claim in paragraphs 1 to 7 and then raised a counterclaim in paragraphs 8 to 10. He never pleaded anywhere that the respondent contributed to her injuries. He stated in his testimony that the respondent was cut by her sons. The trial Court correctly rejected that contention as there was no evidence or pleading was offered in respect thereof and the same had been rejected by the court that had tried the criminal case.

14. In view of the evidence on record, the trial Court cannot be faulted for having held the appellant 100% liable. The cases relied on by the appellant of **Robinson v. Oluoch (supra)** and **Dilip Asal v. Herma Muge & Another (supra)** are not applicable. The said cases relate to road traffic accidents while the case at hand is one of assault. To my mind ***section 47A of the Evidence Act, Cap 80 of the Laws of Kenya*** applies in full force in this case. The appellant had been tried and convicted of having inflicted the subject injuries on the respondent. He admitted not having appealed against the said conviction and sentence. That ground is rejected.

15. The second ground was that the trial Court erred in failing to consider the appellant's counterclaim. The trial court referred to the appellant's counterclaim in its judgment as follows: -

> ***"The judgment in the criminal case was certified as true copy by the learned magistrate and she referred to the questionable and unbelievable defence adduced by the defendant who was the accused person then. On evaluation of the evidence, I do concur with the trial magistrate in the criminal case that the defendant was 100% liable for the injuries inflicted on the plaintiff as the record still remains silent on any possible contribution on the part of the plaintiff and/or any such mitigating factors thus the defendant's counterclaim fails".***

16. From the foregoing, it is clear that the trial Court was of the view that there was no evidence on which the appellant's counterclaim could be based on. I have already stated that the statement of the appellant was bare and only referred to his defence and counterclaim. The counterclaim was pleaded in paragraphs 8 to 10 of the defence and counterclaim as follows: -

"COUNTERCLAIM

> ***8. The defendant repeats the contents of paragraphs 1 to 7 of his defence.***
>
> ***9. The defendant (now the plaintiff) states that on or about the 18th day of October, 2005 the plaintiff occasioned upon his person severe body injuries with a panga.***
>
> ***PARTICULARS OF INJURIES***
>
> ***a) Deep cut wound on the head***
>
> ***b) Deep cut wounds on the left hand wrist joint.***
>
> ***10. The defendant avers that there is no other suit pending between himself and the plaintiff.***
>
> **…"**.

17. At the trial, the only evidence adduced in support of the counterclaim was as follows:-

> ***"I stated that I have sued Miriam Kanyua for she cut me on the head several times and her sons also attacked me and cut me at the back of the head and on the hand. I am seeking for compensation because I still suffer for the injuries that I got when the plaintiff attacked me and injured (sic)".***

18. I have detailed both the pleadings and the testimony of the appellant to show that the complaint against the trial Court as having not considered his counterclaim has no basis. There was absolutely no evidence to make any finding on. The same was never proved and was properly rejected by the trial Court.

19. The final ground was that the award of Kshs.600,000/- was excessive and that the trial Court failed to consider the principles applicable in assessing damages. The principles which guide an appellate Court on issues of quantum of damages are well known.

20. Assessment of damages is in the discretion of the trial Court. That an appellate Court is not to interfere with the exercise of that discretion unless it is demonstrated that in making the assessment, the trial Court considered something immaterial or failed to consider something material or that the damages are too low or too high to be an obvious wrong estimate of damages. **See Bhutt v. Khan [1982 – 1988] KAR 1.**

21. In the present case, the trial Court was alive to its obligation in assessment of damages. This is borne by the fact that it cited the decision of **Potter JA** in **Tayab v. Kinany [1983] KLR 114** on the principles applicable in assessment of damages. In this regard, I reject the criticism that the trial Court failed to consider the relevant principles in assessment of damages.

22. As to the award of Kshs.600,000/- being excessive, I do not think so. The medical report produced in Court showed that the respondent suffered 25% incapacity. She told the Court that she can no longer fend for her family as she lost the use of her right hand. The appellant should count himself lucky as there was no cross-appeal on the award of quantum. In the circumstances of this case, the injuries suffered and the permanent incapacity alluded to, the award was rather low.

23. Accordingly, the appeal has no merit and the same is dismissed with costs.

Signed at Meru

A. MABEYA

JUDGE

DATED and **DELIVERED** at Meru this 23rd day of January, 2020.

A ONG'INJO

JUDGE