REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 174 OF 2018

NANCY WANJA GITAU...APPELLANT

=VRS=

JOYCE NJERI CHEGE..RESPONDENT

{Being an appeal against the Judgement of Hon. N. M. Kyanya Nyamori – RM Thika

dated and delivered on the 20th day of November 2018 in the original Thika

Chief Magistrate's Court Civil Case No. 591 of 2008}

JUDGEMENT

This appeal challenges the award of Kshs. 400,000/= as general damages to the respondent for personal injuries suffered following an assault by the appellant in the year 2005. The grounds of appeal are that: -

> **"1. The learned trial magistrate erred in law and in fact by not appreciating that the plaintiff failed to prove her case on a balance of probability.**
>
> **2. The learned trial magistrate erred in law and in fact in awarding the plaintiff Kshs. 400,000/= as general damages while it was clear that the plaintiff was unable to show that the appellant ever assaulted her.**
>
> **3. The learned trial magistrate erred in law and in fact in failing to appreciate that the charges preferred in criminal case number 511 of 2005 were mere fabrication by the respondent and the police.**
>
> **4. The learned trial magistrate erred in law and in fact in failing to consider and/or adequately adopt and appreciate the written submissions of the defendant/appellant on record.**
>
> **5. The judgement of the trial court was against the weight of the evidence given by the appellant.**
>
> **6. The award of the trial Court was manifestly excessive."**

By the appeal it is sought that the judgement and the decree of the trial Magistrate in civil case No. 591 of 2008 at Thika be set aside and the appeal be allowed with costs to the appellant.

On 13th May 2020 Meoli J, gave directions that this appeal would be canvassed through written submissions and Counsel for both parties duly complied. I have considered the submissions and the cases cited therein fully but as the first appellate court I have a duty to consider and re-evaluate the evidence in the lower court so as to arrive at my own independent conclusion while keeping in mind that I did not hear or see the witnesses who testified ***(See Selle & another v Associated Motor Boat Company Limited & others [1968] EA 123).***

The record of the lower court shows that sometimes in the year 2004 the appellant was charged for causing grievous harm to the respondent contrary to Section 234 of the Penal Code. The record shows that during the trial a P3 Form was produced to prove that the appellant had inflicted bruises, soft tissue injuries and a fracture of the $^{1}/_{3}$ ulna to the respondent. Upon a full trial the appellant was found guilty and convicted for the offence of grievous harm contrary to Section 234 of the Penal Code and placed on probation for two years. There is no evidence and the appellant does not in fact allege that she appealed that judgement. **Section 47A of the Evidence Act** is therefore applicable to her case. **Section 47A of the Evidence Act** states: -

> **"47A A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged."**

The appellant cannot now be heard to say as she does in the memorandum of appeal that there was no evidence that she assaulted the appellant or that the charges were a fabrication by the respondent and the police or that the judgement of the trial court in the civil case was against the weight of evidence.

Section 62 of The Interpretation and General Provisions Act also makes it clear that: -

> **"62. The imposition of a penalty or fine by or under the authority of a written law shall not, in the absence of express provision to the contrary, relieve a person from liability to answer for damages to a person injured."**

In light of the above provision the respondent was therefore entitled to sue the appellant for damages for the battery. I am aware that a conviction does not close the door to a defence on liability as the issue of contributory negligence is always open to a defendant in a civil claim ***(see the Court of Appeal decisions in David Kinyanjui & 2 others v Meshack Omar Monyoro – Civil Appeal No. 125 of 1993 and Francis Mwangi v Omar Al-Kurby C/A No. 87 of 1992)***. However, in this case there was no evidence that the respondent did anything to provoke the assault. It is my finding therefore that the appeal against the trial Magistrate's finding of fact must fail. That leaves me only with the issue of the assessment of damages. On this issue I am guided by the principle that an appellate court should be slow to disturb the award of the trial court unless that court took into account an irrelevant factor or left out of account a relevant one, or the award is so inordinately low or so inordinately high as to be a wholly erroneous estimate of the damage ***(see Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No. 2) [1987] KLR 30).*** As correctly submitted by Counsel for the appellant the award of damages must also take into account awards for comparable injuries – ***see Denshire Mutahi Wambua v Kenya Power & Lighting Co. Ltd [2013] eKLR.*** I have considered the cases cited by Counsel for the appellant. As stated earlier the findings of the trial Magistrate who convicted the appellant for grievous harm cannot be disputed in this appeal given that the appellant did not appeal the conviction. It is not therefore correct to state that what was sustained by the respondent were soft tissue injuries while the P3 Form produced at the trial court indicates that she also sustained a fracture on the 1/3 ulna hence grievous harm. None of the cases cited by Counsel for the appellant have injuries comparable to those of the respondent as those injuries are either too minor or too serious. I am therefore not persuaded that the award of the trial court is based on a wrong principle or that it is so inordinately high as to warrant interference by this court. In the premises the appeal is dismissed with costs to the respondent. It is so ordered.

Signed and dated in Nyamira this 16th day of December 2020.

E. N. MAINA

JUDGE

Judgement dated and delivered in Kiambu Electronically via Microsoft Teams on this 18th day of December 2020.

MARY KASANGO

JUDGE