



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO. 14 OF 2008

BETWEEN

COSMAS WAFULA.....APPELLANT

AND

MICHAEL OKUKU MULEKE.....RESPONDENT

(Being an Appeal from the Judgment and Decree in Busia Principal Magistrate's Court Civil Case No.345 of 2004 by Hon. E.H Keago-Resident Magistrate).

JUDGMENT

1. The appellant herein, was the plaintiff in the Busia Chief Magistrate's Court Civil Case Number 345 of 2004. He had sued for general and special damages after sustaining injuries which he claimed were occasioned by the respondent.
2. After the hearing of the case the learned trial magistrate dismissed the claim. Had the claim been proved, the learned magistrate said he could have awarded Kshs75,000/= general damages. The learned trial magistrate allowed the respondent's counterclaim and awarded him Kshs. 80,000/= general damages.
3. The appellant was aggrieved by the judgment and filed this appeal. He was represented by the firm of Ashioya & Company Advocates. In the Memorandum of Appeal, the appellant set out three grounds of appeal as follows:
 - a) The learned trial magistrate erred in law and in fact in dismissing the appellant's suit when he had found as a fact that the appellant and the respondent were involved in an affray and that both of them sustained injuries.
 - b) That the learned trial magistrate erred in law and in fact in finding that the respondent had proved his counterclaim, when he, at the same time dismissed the appellant's suit when there was strong evidence that both sustained injuries.
 - c) The learned trial magistrate erred in law and in fact in disregarding overwhelming irrefutable evidence of injuries sustained by the appellant.
4. The respondent was represented by the firm of Maloba & Company Advocates. He contended that the appeal lacked merit and prayed for its dismissal.
5. When the matter came for directions on 7th May 2018, it was agreed by both counsel that the appeal would be canvassed by filing and exchanging submissions. The submissions were duly filed and exchanged.
6. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
7. The evidence that emerged during the trial is that the appellant and the respondent were involved in a fight where both sustained injuries of various degrees. The first issue the learned trial magistrate ought to have resolved is who was to blame for the fight. This he did not do. He stated as follows:

I have considered the evidence by both sides and submissions hereof. The plaintiff indeed may have been injured, but he failed to produce the medical report to prove the particularized injuries. Hence his claim cannot stand. It is therefore dismissed with

costs.

Before arriving at the conclusion, the learned trial magistrate was expected to evaluate the evidence on record and state his reasons for doing so.

8. There are two versions of the incident that were presented to the learned trial magistrate. The appellant contended that while he was talking with his cousin, the respondent pointed at him and insulted him. He ordered him to go back to his shop. He complied. The respondent entered his flour mill and emerged from therein with a machete. He went where he was and hit him twice on cheek, on the left lips (presumably on the left side of the lips) twice. He then held him and pushed him against the shop and bit him on the left shoulder. In self defence he bit his thumb.

9. On the other hand, the respondent's version was that while he was seated outside his flour mill, his daughter was selling some chips. The appellant went to her and started to talk to her. When he (the respondent) asked the appellant to leave his daughter alone, the latter insulted him. He called him a person of little mind and told him that there was nothing he could do to him. The appellant hit him on the mouth with a fist. He also used a motor bike to hit him on the right hand and on the chest before biting him on the thumb.

10. On 22nd June 2004, the same day of the incident, the appellant was seen at Port Victoria Sub District Hospital. This was testified to by Nathan Mbundi Kennedy (PW2). He said he observed the following injuries:

- a) Injuries on the left scalp;
- b) Injuries on the left cheek;
- c) Injuries on the left eye;
- d) Human bite wound on the left shoulder joint; and
- e) Soft tissue injuries on the left side of the back and on the right ring finger.

He produced a P3 form which was duly completed and marked as exhibit 4.

11. Dr. Josiah Muyumbu (DW4) examined the respondent and prepared a medical report for him. He sustained the following injuries:

- a) A cut on the upper lip;
- b) Blunt soft tissue injury on the scalp;
- c) Cut wound on the right wrist; and
- d) Human bite on the left thumb.

12. It was erroneous for the learned trial magistrate to make a finding that the appellant did not prove his injuries for failure to produce a medical report. The P3 form which was produced was sufficient evidence to corroborate the contention of the appellant about the injuries he sustained. There is no requirement for a formal medical report especially where the injuries complained of are clearly described from the P3 form.

13. Of the two versions of the incident, that of the appellant was more convincing because of the following reasons:

- a) Though the respondent testified that when he asked the appellant to leave his daughter alone, he insulted him, this was absent in his daughter's evidence. Annet Muleke (DW2) did not testify of any insults to her father by the appellant.
- b) The respondent and his daughter denied that he attacked the appellant. The appellant sustained injuries that were seen on the same day of the incident.
- c) The treatment notes for the respondent did not have an out-patient number of the facility where he sought treatment. This was testified to by Dr. Muyumbu. This raises doubts whether indeed he sought treatment in the facility. There is a possibility that the same was prepared later for the purposes of the case in court.
- d) Clifford Wanyama Opiyo (DW3) gave a different version of the incident. He said that when the appellant went to where the respondent's daughter was selling chips, the latter asked the appellant what he was doing there. This is when the appellant insulted him.

14. From the foregoing analysis of the evidence on record, it emerges that the respondent was the aggressor. It also comes out clearly that the appellant bit the respondent in self-defence.

15. I therefore set aside the judgment and decree of the learned trial magistrate and substitute it with a finding that the appellant had proved the injuries he had complained of. The learned trial magistrate would have awarded him Kshs. 75,000/= general damages. I therefore award

him the sum of Kshs. 75,000/= general damages. I award him a sum of Kshs. 350/= Special damages that were proved.

16. The appeal therefore succeeds with costs in this court as well as in the court below.

DELIVERED and SIGNED at BUSIA this 25th day of February, 2019

KIARIE WAWERU KIARIE

JUDGE