REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 102 OF 2012

Appeal arising from the Judgment of Honourable D.W Mburu

(CORAM: F. GIKONYO J)

MARCELA MUKIRI WILSON……………………………….APPELLANT

-VS-

CHARITY MWARI………..………...…………………….RESPONDENT

JUDGMENT

Appeal against dismissal of case

[1] Being dissatisfied by the Judgment of Honourable D.W. Mburu dismissing the Appellant's claim against the Respondent herein, the Appellant filed this appeal citing the following 11 grounds in the Memorandum of Appeal dated 7th November 2012:

> **1. That the Learned Trial Magistrate erred in law and fact in finding and holding that the appellant and the respondent fought, yet the appellant was not charged with either affray or assault or sued afresh or through a counter claim to compensate the respondent given that the appellant was sickly and pregnant.**
>
> **2. That the Learned Trial Magistrate erred in law and fact by finding that the Respondent was not liable for the serious and excruating injuries she inflicted upon the appellant, yet in cross examination in the primary suit and Nkubu SPMC CR NO. 1315 of 2008 the respondent conceded having bitten the appellant.**
>
> **3. That the Learned Trial Magistrate erred in law and fact in failing to observe that the P3 Form relied on by the respondent states that the alleged injuries were three days old by 24th July 2008 when the said P3 was filled by the doctor.**
>
> **4. That the Learned Trial Magistrate erred in law and fact in failing to state or specify how the appellant failed to prove her case in the wake of ample, cogent corroborative and overwhelming viva voce and documentary evidence.**
>
> **5. That the Learned Trial Magistrate erred in law and fact in failing to find and hold that the respondent had been assaulted as alleged she would have sued the appellant or at least**

counterclaimed against her for compensation.

6. That the Learned Trial Magistrate erred in law and fact by relying on un pleaded and unproved alleged, but repugnant custom on curses.

7. That the Learned Trial Magistrate erred in law and fact in failing to find that the appellants evidence was in tandem with her amended plaint, and the respondents evidence was contradictory, besides departing from her amended defence.

8. That the Learned Trial Magistrate erred by not addressing the appellant's claim on special damages, albeit pleaded and proved.

9. That the Learned Trial Magistrate erred in law and fact by disregarding the conviction in Nkubu SPMC CR. NO. 1315 of 2008, converse to Section 47 of the Evidence Act CAP 80 of the Laws of Kenya.

10. That the Learned Trial Magistrate erred in law and fact in failing to hold that the respondent was a pathological liar in her evidence which was not corroborated by her single witness.

11. That the Learned Trial Magistrate erred in law and fact by proposing an inordinately low award of Kshs 100,000 as general damages.

Directions

[2] When the matter came up for hearing on 28th April 2016, it was agreed that the appeal shall be disposed of by way of written submissions. Parties filed the submissions which I will analyze below.

Submissions by Appellants

[3] The Appellants in their submissions reiterated the contents in the Memorandum of Appeal, but, specifically submitted inter alia:

(a) That the Trial Magistrate erred in holding that the parties herein fought. Yet the Appellant had testified that she was pregnant and sick and so she told the Respondent she could not fight. In addition, the Appellant submitted that she clarified that the Respondent hit and bit her lower lip under the encouragement and watch of her husband. According to her, PW2 an independent witness corroborated the Appellant's evidence that she did not fight as was erroneously held by the trial magistrate. On this ground, she opined that if the two fought, the police would have so established and the Respondent would also have sued the Appellant separately for compensation or counterclaimed in the Appellant's primary case.

(b) That it was not true that the Respondent was assaulted as alleged in her oral testimony as she did not avail an independent witness to corroborate her allegations.

(c) That the trial court failed to find that the evidence both oral and documentary adduced by the Appellant and her three witnesses in the primary case was in total agreement with, supported and sufficiently proved her averments in the amended plaint vis-a vis the uncorroborated evidence of the Respondent, which sporadically departed from her amended statement of defence and came in glaring conspicuous conflict and contradictions with her exhibits.

(d) That had the trial court been keen; it would have noticed that the P3 form relied on by Respondent alleged that the purported injuries were 3 days old by 24th July 2008, when the P3 form was filled.

Submissions by the Respondent

[4] On the other hand it was submitted for the Respondent:-

> (a) That there was evidence from the Appellant that the two had quarreled the previous day. Accordingly, the trial court found that there was actually a fight between the two ladies and that both sustained injuries. The injuries were confirmed by the medical records. Therefore, the trial court was right in holding that the Appellant was not entitled to damages. Although the Respondent admitted biting the Appellant, she explained that it is the Appellant who attacked her with a club.
>
> (b) That there was nothing strange in the Respondent reporting to the police 3 days after the injury and that the small discrepancies in the P3 Form as to the time of injury and date of treatment were minor matters which did not go to the real issue that both parties had a fight on 16th June 2008.

DETERMINATION

[5] I have carefully considered this appeal, the rival arguments of the parties and the authorities relied upon by the Appellant. This being a first appeal, the court should analyze and re-assess the evidence on record and reach its own conclusions except bearing in mind that it neither saw nor heard the witnesses testify See ***SELLE V ASSOCIATED MOTOR BOAT CO.*** **[1968] EA 123** and ***KIRUGA V KIRUGA & ANOTHER*** **[1988] KLR 348**.

[6] The Appellant's evidence was that on 16th June 2008 she had gone to a cobbler one Cosmas Mwiti to take her slippers. On her way back, she met the Respondent who was armed with a knife. The Respondent said to her that she wanted them to fight her for speaking about her private life. The Appellant declined the dwell; she told the Respondent that she could not fight for she was pregnant and ill with anemia. Then the Respondent hit her with her on the forehead with her right hand and sat on her stomach. The Appellant quickly held the Respondent's hands in order to prevent from hurting her with the knife the Respondent was holding. The Appellant screamed. The Respondents husband who all along was encouraging his wife to fight the Appellant, held the Appellant's hands, thus, giving Respondent a chance to bite the Appellant's mouth. She stated that Teresia Muthee and Cosmas Mwiti arrived at the scene and separated the two. She thereafter made a report to the Police and the Respondent was arrested.

[6] Dr. Isaack Macharia testified as PW2 to the effect that he examined the Appellant on 24th May 2010 in respect of alleged assault on 16.6.2008. He gave the history and nature of injuries sustained by the Appellant.

[7] Cosmas Mwiti also testified and narrated what happened on the material day. He said that the Respondent and her husband Gilford were waiting for the Appellant along the road. On reaching where they were, the Respondent hit the Appellant on the head and she fell down. The Respondent wrestled the Appellant to the ground. The Respondent's husband then held the Appellant's hands while she was down and the Respondent used that opportunity to bit the Appellant's lower lip. He together with Teresia arrived at the scene and separated the two.

[7] The Respondent on the other hand contended that on the material day she was in her house preparing breakfast when she had someone calling her. On checking she found it was the Appellant. The Appellant was armed with club. The Appellant then hit her on the chest using a club and started screaming. A fight between the two then ensued and they fell down. She stated that she bit the Appellant and the Appellant also bit the Respondent's finger. According to her, the Appellant had gone to confront her for allegedly spreading rumors against her more particularly that her legs were dirty. She made a report to the police and was given a note referring her to hospital. But, she did not go to hospital the same day but on 19.6.2008. She was treated at St. Luke's Kiamuri Hospital and later on a P3 Form was accordingly filled by the doctor. She called her employee one Patrick Ngogo Ruhiu as her witness DW2 who supported her story.

[8] On considering the evidence before the court, the Learned Trial Magistrate remarked in his judgment inter alia as follows:

> **“the P3 form produced by the defendant as exhibit 3 shows that she suffered human bites on the face, tenderness of the anterior chest wall, on upper limb, she had a human bite on the left hand. The defendant also produced a letter from Kiamuri police patrol base dated 16th June 2008 referring her to hospital for treatment. The letter says that she had made a report of having been assaulted. She produced her attendance card for St. Luke Cottage Hospital to show that she was treated on 19th June 2008. The P3 on plaintiff also shows that she suffered a human bite on the lower lip. In both cases, the P3 form shows that probable type of weapon was human teeth. From the evidence available on record, both the plaintiff and the defendant inflicted human bites on the other party. The parties were fighting. Regardless of who the aggressor was, I think that the correct charge to have been preferred should have been that of affray. It is not clear why the police chose to charge the defendant with causing grievous harm yet she had also sustained human bites and was first to make a report. The judgment in Nkubu SPM’s Court is not binding upon this court. It can only be of persuasive value. The upshot of the foregoing is that I find that the plaintiff has not been able to prove that the defendant is liable in this case. Following this finding, I accordingly dismiss the plaintiff’s suit with costs.”**

[9] In this case, each of the parties herein gave own account of the events of 16.6.2008. The Appellant stated that the scene of the incident was along the road whilst the Respondent said it was at her home. Such is expected especially in a brawl of this nature. The trial magistrate correctly captured this dilemma when he stated that:

> **‘’I have found that it is not dispute (sic) that a fight occurred between the Plaintiff and the Defendant on 16.62008. The bone of contention, however, is where the fight took place and who was the aggressor (sic).**

There was obviously a disparity there and the two distinct issues needed specific resolution. That should be done by the court by falling back to the law and evidence in order to resolve the disparity. The court merely narrated the evidence by the Appellant and her witnesses and it seems discarded it without assigning it any weight whatsoever. The trial court did not resolve where the fighting took place and who the aggressor was. He only relied solely on the P3 Forms to come to the conclusion that this was a case of affray. I note from cross-examination the Respondent stated these:

> **‘’…I admit that I bit the plaintiff on her lower lip. The note from the police (D. Exhibit 1) does not indicate that I had suffered a bite on the left thumb. The treatment notes, D. Exhibit 2(a), are not signed. They do not bear any rubberstamp of the hospital. I do not understand the contents of the treatment notes.**

The foregoing should have cast doubt on the Respondent’s claim.

Vicious attack on the roadside

[10] The evidence by the Appellant and his witnesses that the Respondent and her husband way-laid her and that the Respondent attacked the Appellant first was not evaluated at all. There was no reason at all given why the trial magistrate chose to believe the Respondent’s account of events of the material day and not the one by the Appellant. I should state that from the record and cross-examination, the evidence of the Appellant that; she was way-laid by the Respondent and her husband; that the Respondent attacked her first and with the help of her husband bit the Appellant’s lower lip was not controverted at all. PW3 also confirmed that account. Accordingly, the evidence shows that the aggressor was the Respondent who had pre-meditated the assault upon the Appellant. The evidence shows that the fighting took place along the road and not at the home of the Respondent. The Respondent’s story was intended to create the impression that the two fought and she bit the Appellant in self-defense.

[12] One other important aspect of this case is the conviction and sentence of the Respondent for causing grievous bodily harm upon the Appellant in Nkubu SPMCCRC NO 1315 OF 2008. Doubtless, the judgment in the criminal case became directly in controversy in this case. To begin with, the judgment

was produced and admitted in evidence. The judgment had not been overturned on appeal or reviewed. It was also not shown not to have been delivered by a competent court or to have been obtained through fraud or corruption. Of importance to note, the Respondent merely stated in cross-examination that she did not file an appeal against conviction and sentence in the criminal case because her father told her not to in order to obviate a curse which is running in the family. Therefore, the trial magistrate ought to have considered as part of and it in light of the other evidence adduced rather than dismissing it with strong words as shown below without assigning proper reason of doing so. The trial court stated this:-

The judgment in Nkubu SPM's Court is not binding upon this court. It can only be of persuasive value.

[13] Upon production and admission of the said judgment in the civil proceeding, the judgment attains pertinent judicial value; it is conclusive evidence of guilt of the offence for which the Respondent was charged with and convicted. This case was all about assault. And section 47A of the Evidence Act should have been a perfect guide here especially where there was a dichotomy on the kind of liability that arises from the facts of the case. Section 47A of the Evidence Act provides that:

> 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 corroborative values of this judgment to the case of the Appellant was vital and a matter of considerable weight.

[14] Accordingly, the evidence on record shows that the Respondent planned and viciously attacked the Appellant. With the help of her husband, she bit the Appellant's lower lip thus causing injuries to her. I find and hold that the Respondent willfully caused and is liable for the injuries sustained by the Appellant. Therefore, I set aside the judgment of the trial court which dismissed the suit by the Appellant and enter judgment for the Appellant.

Quantum

[15] The Appellant herein prayed for general damages for pain, suffering and loss of amenities as a result of an alleged vicious attack by the Respondent as a result of a bite. According to a medical report prepared by Doctor Macharia, the Appellant complained of deformity on the lower lip, her speech was affected by the deformity and the deformity had affected her self-esteem. The doctor further formed the opinion that the Appellant needed surgical correction by a plastic surgeon at an estimated cost of Kshs 100,000. In cross examination, the doctor appeared to contradict himself by stating that he had not made a finding that the bite interfered with the Appellant's speech. He further stated that he had consulted his colleagues who worked in Nairobi on the cost of plastic surgery and that he had no experience on the cost. Consequently I am of the opinion that the cost of future medical expenses was not proved. Taking into totality the circumstances in this case, I am of the opinion that a sum of Kshs 250,000 would be adequate compensation as General Damages.

[16] In so far as Special Damages is concerned, the Appellant claimed Kshs 47,000 being legal fees, treatment expenses and medical report. It is trite law that special damages must not only be pleaded but must be proved specifically. The Appellant produced receipts by the firm of Mithega and Company Advocates amounting to Kshs 40,000 being legal fees and a receipt for Kshs 3,000 issued by Dr. Macharia in respect of a medical report. Consequently I am satisfied that the Appellant has been able to prove Kshs 43,000 and I award the said sum under special damages. I also award her costs of the suit and interest at court rates. That is the judgment of the court.

Dated, signed and delivered in open court at Meru this 30th day of

March 2017

F. GIKONYO

<u>JUDGE</u>

<u>In the presence of:</u>

Ashaba advocate for Carlpeters advocate for Appellant

M/s. Muna advocate for Murango advocate for respondent

F. GIKONYO

<u>JUDGE</u>