



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KISUMU**

**CIVIL APPEAL NO. 64 OF 2011**

**BETWEEN**

**TOM J. AKUN.....APPELLANT**

**AND**

**MERCELINE ONDIEGI AKELLO.....RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. B. Olao, CM*

*dated 24<sup>th</sup> March 2011 at Chief Magistrates Court in Kisumu*

*in Civil Case No. 144 of 2007)*

**JUDGMENT**

1. The respondent, **Merceline Ondiegi Akello**, filed suit in the subordinate court against **Tom Akuno Ayoro** claiming general and special damages for injuries inflicted on her body by a ram allegedly belonging to the appellant. The defendant countered by filing an amended defence in which he denied that the incident took place or that he owned the ram. He also pleaded in the alternative that if the incident took place then the respondent was solely responsible for the incident as she provoked the ram.

2. The respondent succeeded at the trial and was awarded Kshs. 300,000/- and Kshs. 9,455/- in general and special damages respectively. Being aggrieved by the judgment, the appellant lodged the memorandum of appeal dated 18<sup>th</sup> May 2011. In summary the appellant complained that the trial magistrate erred in finding him liable. He contended that the learned magistrate erred in shifting the burden of proof to him and also in finding that he owned the ram despite lack of evidence to that effect. The appellant challenged the award of general damages on the ground that it was excessive in the circumstances.

3. Before this court, Mr Yogo, learned counsel for the appellant, reiterated the grounds of appeal I have outlined above and emphasised that the findings were made in the absence of evidence that the ram in question was owned by the appellant. He submitted that despite producing his National Identification Card to show that he was not the person named as the defendant, the learned magistrate still found the appellant liable.

4. Learned counsel for the respondent, Mr Owiti, supported the judgment and submitted that the respondent's witnesses confirmed that they knew the appellant very well and that the ram belonged to

him. He further submitted that in the amended defence filed in court, the appellant admitted description given to him by the respondent in the plaint hence he could not contest the express admission.

5. This being a first appeal this court's role as the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that reach an independent conclusion as to whether to uphold the judgment (see ***Selle v Associated Motor Boat Co. [1968] EA 123***). In order to carry out this task it is necessary to outline the facts emerging at the trial.

6. On 11<sup>th</sup> January 2007, the respondent (PW 1) took her child to Kondele Primary School. As she entered the classroom, she was attacked by ram which hit her and broke her left arm as she tried to block it. She recalled that as she was being taken to hospital, the school headmaster summoned the owner of the ram. She stated that it is the wife of the owner of the ram who came and took her to hospital. When cross-examined, she admitted that she did not know the owner of the ram. Dr Sam Oruro (PW 3) confirmed that she had sustained a fracture of the right radius and left ulna and a blunt injury to the back. Kaitanus Njiri Rakwaro (PW 2), a guard at the school, recalled that on that morning he saw the ram coming from the fence running towards PW 1 whereupon it hit her. He went to her aid and assisted in taking her to hospital. He told the court that he did not know the owner of the ram but stated that the owner was a neighbour to the school and that he knew him well.

7. The appellant (DW 1) testified that he was called Tom Julianus Akun and was the holder of a national identity card number 11\*\*\*\*87. He denied that he knew Tom Kuno Ayoro, the defendant who had been sued. He further denied that he knew the respondent or that he knew of the incident. He told the court that he did not reside next to Kondele Primary School or own a ram as alleged. He only got to know about the incident when he was served with the summons to enter appearance and the plaint in the matter.

8. The respondent's evidence on how the incident took place and the fact that she was injured by a ram was not challenged. The main issue for determination whether the appellant was the owner of the ram. On this issue the learned magistrate held as follows;

*Although the defendant denies being the TOM AYUNO AYORO sued in this case, he admitted the plaintiff's description of him in his own amended defence (paragraph 2) which was note even under protest. Further, there is no indication that he refused this summons, instead he received them and instructed his law who filed defence in the same names that the plaintiff had described him.*

9. Two contentions arise from this issue. First the nature of pleadings and second, the burden of proof. In any civil case, the issues in contention arise from the pleadings. This had been re-emphasised in several cases. In ***Gandy v Caspair Air Charters Limited [1956] 23 EACA 139***, the Court of Appeal for Eastern Africa expressed the view that;

*[T]he object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them; so that each party may have full information of the case he had to meet and prepare his evidence to support his own case or meet that of his opponent. As a rule relief not founded on the pleadings will not be given.*

10. The tenor of the appellant's defence was denial of the incident in total and an alternative defence that the respondent was solely to blame for the incident. Thus the burden of proof was on the respondent to prove not only that the incident took place but also that the defendant was liable as alleged. The reliance on the admission of the descriptive part of the plaint could only take respondent so far as the statement of defence did not contain admissions of the cause of action. The admission contained in the amended statement of defence was of paragraph 2 of the plaint which stated that, "*The Defendant is a male adult of sound mind residing and working in for gain in Kisumu.*" The ingredients necessary for the claim to succeed were not admitted and remained contested.

11. Turning to the issue of burden of proof, **Chapter IV, Part I (sections 107 – 119)** of the ***Evidence Act***

**(Chapter 80 of the Laws of Kenya)** deals with burden of proof. The sum total of those provisions is that whoever desires any court to give judgment as to any legal right or liability, dependant on the existence of facts which he asserts, must prove that those facts exist. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall be on any particular person.

12. PW 1 and PW 2 did not identify or name the owner of the ram in their testimony. PW 1 stated, “[T]he headmaster summoned the owner of the ram” and that, “I was taken to the gate of the owner of the ram and he took me to Russia Hospital... It was the wife of the owner of the ram who took me to hospital.” On the part of PW 2 he recalled that, “I don’t know the names of the owner of the ram but he was a neighbour to the school.” They did not even mention the name of the defendant as pleaded.

13. Could the respondent be said to have proved her case and in particular the owner of the ram on the balance of probabilities? The answer, in the absence of an admission by the respondent, is clearly no. Even if the appellant did not call evidence in rebuttal, the respondent’s case would have failed as the owner of the ram was not identified and the appellant was not obliged to disprove the fact that he was the owner. On the other hand, the appellant called evidence showing that his name was not that of the defendant stated in the plaint. The appellant testified that he did not live next to the school where the incident took place or own the ram. These facts were not only peculiarly within his knowledge but were facts which he was required to prove, on the balance of probabilities, in order to establish that he was not the person referred to or the owner of the ram in question. In this case he proved his defence on the balance of probabilities.

14. I therefore find and hold that respondent failed to prove that the appellant was the owner of the ram that caused her injuries. Contrariwise, the appellant proved that he was not the owner of the said ram. The fact that the appellant received the summons, entered appearance and filed defence does imply an admission or in any way absolve the respondent from proving her case.

15. Despite the finding I have reached, I must also consider the question as to whether the award of general damages was excessive. The principles which guide an appellate court in an appeal on award of damages are now well settled. In disturbing the quantum of damages awarded by a trial judge the appellate court must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage (see ***Kemfro Africa Ltd v Lubia and Another (No. 2) [1987 KLR 30]***). The appellant did not cite any cases or decisions indicating the award made by the learned magistrate was inordinately high or excessive. The respondent sustained fracture of the radius and ulna and in my view the award of Kshs. 300,000/- was reasonable.

16. The appeal is allowed with costs to the appellant. Consequently the suit in the subordinate court is dismissed with costs to the appellant.

**DATED and DELIVERED at KISUMU this 28<sup>th</sup> day of July 2016.**

**D.S. MAJANJA**

**JUDGE**

Mr Yogo instructed by Otieno Yogo Ojuro & Company Advocates for the appellant.

Mr Owiti instructed by Odhiambo Owiti & Company Advocates for the respondent.