



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**CIVIL APPEAL NO. 247 OF 2003**

**JOHN GITAU KIHARA .....APPELLANT**

**VERSUS**

**SIMON WAHOME GITONGA.....RESPONDENT**

*(An appeal from the original judgment and decree in Milimani Commercial Courts CMCC No. 8591 of 1999 delivered on 2<sup>nd</sup> April, 2003 by Hon. Mrs. T.W.C. Wamae)*

**JUDGMENT**

1. The Respondent sued the Appellant for general and special damages arising out of an alleged assault by the Appellant.
2. The trial court heard the matter and entered judgment in favour of the Respondent for KShs. 300,000/= as general damages plus costs and interest and KShs. 5,000/= being doctor's attendance fees.
3. Being dissatisfied with the trial court's judgment, the Appellants filed this appeal on the grounds that:
  - i. ***That the Learned trial Magistrate erred in law and in fact in failing to appreciate that the Plaintiff had proved his case on a balance of probabilities.***
  - ii. ***That the Learned trial Magistrate erred in law and in fact in failing to address his mind on the evidence adduced and hence made an erroneous finding dismissing the suit.***
  - iii. ***That the Learned trial Magistrate erred in law and in fact in making a finding that the Defendant's evidence was not challenged.***
  - iv. ***That the Learned trial Magistrate erred in law and in fact in making a finding that the Plaintiff's witness evidence was inadmissible.***
  - v. ***That the Learned trial Magistrate erred in law and in fact in failing to consider the parties written submissions.***
  - vi. ***That the Learned trial Magistrate erred in law and in fact in failing to set out the issues for determination and in failing to make specific and concrete findings on the issues in dispute.***
  - vii. ***That the Learned trial Magistrate erred in law and in fact in failing to make complete, clear and intelligible record of the proceedings and thereby deprived the appellant his right to a fair trial.***

4. This being a first appeal, it is my duty to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of hearing the witnesses testify. (See: **Peter v. Sunday Post (1958) at pg. 429**). The Appellants' gravamen is on the issue of liability.

5. PW1 Dr. Kiama Wangai testified that the Respondent complained that he had lost his sight on the right eye. He had pain on the right eye and on the right side of the neck. He had conjunctiva of the right eye. His right side of the neck was tender. He stated that the condition on the right eye was permanent.

6. PW2, The Respondent herein testified that on 8<sup>th</sup> August, 1997, he met the Appellant and a lady unknown to him at a hotel in Naivasha. The lady abused her and on asking her why she abused him, she continued abusing him. The Appellant then came to where he was and kicked and punched him. The Appellant whipped him occasioning injury to the right eye and back of neck. He reported the matter to Naivasha Police Station and went for treatment at Naivasha District Hospital and later P.C.E.A Kikuyu Hospital where he was admitted for a week. He produced a discharge summary and police abstract P. Exhibit 3 and 4 respectively. He also produced proceedings in Nairobi Chief Magistrates Court Criminal case No. 2808 of 1997. On cross-examination, he stated that he was assaulted outside a bar. He had at the time taken Pilsner beer. He stated that the lady who insulted her told her to go and sleep with a cow. He admitted that he did not have proof that he was admitted in hospital for five (5) days but maintained that he was admitted. He stated that the criminal case was dismissed under Section 210 of the Criminal Procedure Code. He stated that he had no grudge with the Respondent and does not know why he assaulted him. That he did not know the lady who insulted him and had never seen her before.

7. DW1, the Appellant herein recollected that on the material day he exchanged pleasantries with the Respondent at Lakeside Tourist Lodge. The Respondent was in company of a lady called Wahito. The Respondent told Wahito of his interest to spend the night with her, in return Wahito told him that he would sleep with a cow and not her. The Respondent was angered. He held Wahito by her hair and removed her from the chair she was seated on and she fell. When she stood, she took a beer bottle which she used to aim at the Respondent. The Appellant then stood amidst them to prevent them from fighting. A watchman who had a whip, whipped the Respondent and he fell on the verander. He was then taken to hospital by the owner of the hotel. On cross-examination, the Respondent maintained that he did not assault the Appellant.

8. DW2, Lucy Aphaxard stated that on the material day she was in company of the Respondent when the Appellant walked into the bar with a lady and joined them. The Appellant and the lady started exchanging insults annoying the Appellant. The lady tried to hit the Appellant with a beer bottle. The Respondent stood between the two to shield them. She stated that the Appellant was dragged out of the hotel by the watchmen.

9. The trial magistrate heard the matter and awarded the Appellant KShs. 600,000/= as general damages.

10. Section 109 and 112 of the Evidence Act provides:-

***109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***

***112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.***

10. The two sections encapsulate the well-known aphorism, "he who asserts must prove." This point was restated by the Court of Appeal in **Jennifer Nyambura Kamau Humphrey Mbaka Nandi [2013]eKLR** as follows:-

***"We have considered the rival submissions on this point and state that section 107 and***

***109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the Evidence Act provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.”***

I have considered the evidence on record, it is not clear why the watchmen who the Appellant claims beat up the Respondent was not brought to court to controvert the Respondent’s case. The decision of the trial court cannot be faulted. The appeal is hereby dismissed with costs.

Dated, Signed and Delivered in open court this 20<sup>th</sup> day of February, 2015.

J. K. SERGON

**JUDGE**

In the presence of:

Mr. Khalawale for the Appellant

N/A for the Respondent