



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO.20 OF 2012

CHRISTINE AGNES OMANYORESPONDENT/PLAINTIFF

VERSUS

MATILDA AKUMU KHADULIAPPELLANT/DEFENDANT

(An Appeal from the Judgment and Decree of the Chief Magistrate W.N. Nyarima delivered on 10th April 2012 by W. Kiarie C.M. in Busia CMCC no.77 of 1999)

J U D G M E N T

1. It had been alleged that on or about 15th September 2006 the Respondent (**also referred to as the Defendant**) viciously assaulted and injured the Appellant (**also referred to as the Plaintiff**). The Appellant filed an action in the Principal Magistrates Court at Busia claiming General and Special Damages for injuries suffered as a result of that attack. Although the Trial Court found for the Appellant and awarded Special Damages of 4,000/= and General Damages of ksh.20,000/= both subject to 50% contribution, the Appellant is aggrieved by both the finding on liability and quantum.
2. In an Amended Complaint dated 25th May 2011, the Appellant averred that on 15/9/2001 or thereabouts, the Defendant without any reasonable cause or colour of right viciously and barbarically attacked the Plaintiff with firewood and thereby caused her serious injuries. Those injuries were particularized as a fracture of radius and ulna, blunt soft injury on the left cheek and broken tooth of the upper jaw. In an Amended Defence dated 6th June 2011, the Defendant filed a general denial to the claim.
3. At Trial, the Appellant told Court that she knew the Respondent since the year 2005. That prior to the incident which formed the subject matter of the action, the two had a misunderstanding in respect to electricity and that the Respondent had threatened to discipline the Appellant. The threat was to be realized on 15th September 2006 at around 8.00p.m when the Respondent attacked the Appellant using a piece of wood. The Respondent, it is said, hit the Appellant on the left hand, left Rib and left cheek. The victim screamed in distress and one Militus Egesa came to her rescue. The Appellant sustained some injuries which required her to take first aid at Nangina Health Centre and treatment at Busia District Hospital.
4. Dr Amos Muyumbu (PW 2) is a Medical Doctor practicing in Busia Town. He examined the claimant on 13th May 2008 and found that she had sustained a fracture of the left radius and ulna, blunt soft tissue injury to left cheek and broken tooth (upper jaw). The evidence of this witness and the nature of the injuries is discussed with more detail at a later stage of this judgment.
5. Following the incident, the Appellant lodged a criminal complaint against the Respondent. Subsequently the Respondent was, in **Busia Criminal Case No.2491 of 2006 Republic –vs- Matilda Akuku Khaduli alias Yvonne**, charged with the offence of causing grievous harm contrary to Section 254 of the Penal Code. After full trial, a conviction was returned against her

- and she was sentenced to a fine of ksh.5000/=or in default 12 months imprisonment. The proceedings and judgment of the Criminal Trial were produced in support of the Appellants claim.
6. In her Defence, The Respondent stated that it was the Appellant who attacked her on that night using a sword. That the Appellant cut the Respondent on the neck and left leg. A struggle ensued and neighbours had to separate them. That the Respondent reported the incident to Nangina Police Post and then sought treatment from Nangina Hospital. Later, on reporting back to the Police Station she was arrested. The Respondent denied hitting the Appellant at all. That she acted simply in self-defence.
7. After hearing this evidence the Learned Trial magistrate found in favour of the Plaintiff as follows:-

- I. **Special damages less 50% contribution kshs2000/=**
- II. **General damages less 50% contribution kshs10,000/=**
- III. **Because of shared liability each party shall bear own costs of the suit.**
- IV. **Interest on (i) and (ii) be calculated at court rates from the date of this judgement.**

8. Aggrieved by that Decision the Appellant filed a Memorandum of Appeal which raised the following 3 grounds:-

- I. **THAT the learned trial Magistrate erred in law and in fact in apportioning liability at 50:50 per cent contrary to the weight of the evidence tendered before him.**
- II. **THAT the learned trial Magistrate erred in law and in fact by awarding general damages that were inordinately so low compared to the skeletal and other injuries suffered by the appellant.**
- III. **THAT the learned trial Magistrate erred in law and in fact in ordering that each party bears her own costs when he ought to have awarded the costs of the Appellant.**

9) This being a first Appeal this Court has a duty to re-evaluate the evidence, assess it and make its own conclusion, whilst remembering that it has not seen or heard the witnesses and making due allowance for this (Selle v Associated Motor Boat Company [1968] EA 123).

10) In Directions given on 16th September 2014, the Appeal was to be disposed of by way of written submissions. The Appellant was directed to file and serve her written submissions within 30 days and the Respondent to file and serve her reply within 30 days of service. When the matter came up for mention on 10th November 2014, only the Appellant had filed submissions. The Respondent through Counsel Ipapu requested for 7 days to file her reply. The Court in the meantime reserved judgment for 10th December 2014. As of the date of writing the judgment (which is outside the 7 days sought by the Respondent), the Court is yet to receive the Respondents' submissions.

11) In summary, Counsel for the Appellant submitted that the Learned Magistrate apportioned liability at 50:50 without any evidence. That the criminal conviction was proof that the Respondent was 100% liable. That at any rate the Respondent neither pleaded for apportionment nor filed a counterclaim and there was no basis for the Trial Court to reach a decision on apportionment. Counsel submitted that the Learned Magistrate ought to have found the Respondent 100% liable.

12) On quantum, it was submitted that the claimant sustained a fracture of the radius and ulna, blunt soft issue injury to left cheek and broken tooth on upper jaw. That the award of General Damages of ksh.20,000/= was inordinately low and Counsel cited several authorities in support of this proposition.

13) This Court starts its rendition by discussing the question of liability. The Learned Trial Magistrate made a finding that the Defendant assaulted the Plaintiff. The Trial magistrate held,

“From the evidence on record, it is clear that the Defendant had premeditated a plan to beat up the Plaintiff for she had threatened to do so. I find that the Defendant intentionally and voluntarily caused physical harm and damage to the Plaintiff.”

This Court, on its own and independently, finds that on the evidence before the Court, the Learned Trial Magistrate was justified in reaching that conclusion. What is that evidence?

14) The Appellant gave evidence of how she was attacked by the Respondent using a piece of wood. How she was hit on the left arm, left cheek and left rib and she sustained injuries. She was rescued by one Merit Egesa and she was treated first at Nangina and later at Busia Hospital. She produced a treatment book (P Exhibit 1) and P3 Form (P Exhibit 2) as proof of her treatment.

15) In further support of her claim, the Appellant produced proceedings and the judgment in Busia Criminal case no.2491 of 2006 in which the Respondent was convicted. Her evidence in the civil case is materially consistent with what she told the Criminal Court. Important in the criminal proceedings was the testimony of Merit Egesa who came to the rescue of the Appellant. This was his evidence:-

“I went there and separated them. The complainant was by then down while the accused was sitting on top of her. She used her fists to beat her. I saw the complainant being beaten all over the body. The complainant was crying about her left hands which she alleged to have been fractured. I saw the stick which the accused used to injure the complainant. This is the piece of wood used (MFI – 4)” (my emphasis)

The long and short of this evidence, which was not debunked by cross-examination, was that the Respondent was beating the Appellant. The Criminal Court believed the Prosecution case and convicted the Respondent. The Respondent never appealed against that decision and it has not been set aside or reviewed.

16) That evidence in support of the claim must be compared to the evidence for the Defence. The Respondent concedes to a struggle between her and the Appellant but alleges that she was the victim of attack by the Appellant. That all she did was to act in self-defence. She alleged that she suffered a cut injury on her neck and left leg. Before the Civil Court she first said,

“We struggled and neighbours separated us.”

She later testified;

“when the Plaintiff attacked me, I struggled to free myself so that I could turn to my home. I managed to escape into my house.” (my emphasis)

In the criminal proceedings her testimony in this respect was,

“While I was going out the complainant held me on the shoulder. We struggled but we were separated by another man.”

That other man was presumably Egesa. So did the Respondent free herself or were they separated? And if they were separated, what is the Court to make of the evidence of Egesa that he saw the Respondent beating up the Appellant. This Court is persuaded that both the Civil and the Criminal Court were justified in finding that the Respondent assaulted the Appellant.

17) Up to that point, the Learned Trial Magistrate cannot be faulted. But the turning point in his judgment is the following remarks:-

“The defendant sustained same injuries. Her legal counsel has submitted that a physical confrontation did occur between the parties and both sustained injuries therefore liability should be spread equally amongst the two. The treatment notes which the defendant produced appear genuine and do prove on a balance of probabilities that the defendant sustained injury. The injuries are attributed to the confrontation. The plaintiff presented and relied on the proceeding on the criminal case. In the judgment, it was noted that the defendant was injured save that the

plaintiff may have injured her while acting in self defence, in other words the plaintiff did not act intentionally and voluntarily. We must however appreciate that she too was armed therefore appears to have been prepared for the engagement.”

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18) It is not entirely clear whether the Learned Magistrates finding was that the Defendant partly succeeded in setting up a plea of self- defence or that she had “set off” her injuries against those of the Plaintiff. Looking at the Defence the Respondent did not plead self- defence or contribution. These are matters that must be specifically pleaded in any pleading subsequent to a plaint. See order 2 Rule 4(1) of The Civil Procedure Rules which provides:-

“4.(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality-

- a. **which he alleges makes any claim or defence of the opposite party not maintainable;**
- b. **which, if not specifically pleaded, might take the opposite party by surprise; or**
- c. **which raises issues of act not arising out of the preceding pleading.**

Secondly, the Defendant did not plead a set-off or counterclaim. Whichever way, the Learned Trial magistrate erred in making a finding on matters that were not pleaded. For this reason I hold that the Learned Magistrate erred I finding the Appellant 50% liable and only holding the Respondent 50% to blame. That finding is hereby set aside and in its place I find that the Respondent is wholly liable for the injuries suffered by the Appellant on 15th September 2006.

19) I now turn to consider the question of quantum. The evidence of the injuries sustained by the Appellant was in the patient’s passbook from Busia District Hospital, the P3 Form filed on 18th September 2006, the Medical report by Dr Muyumbu and his oral evidence. The common injury in this evidence is that the Claimant suffered a fracture of radius and ulna. The loss of a tooth or soft tissue injury to her left cheek was not captured in the medical notes of Busia District Hospital where the Claimant received medical attention immediately after the incident and in the P3 Form that was filled soon thereafter. Under cross-examination the Doctor admitted that these two injuries were not mentioned in those initial medical documents. I would hold that on a balance of probabilities the injuries proved was the fracture of the left radius and ulna. The Appellant has asked this Court to find that an award of General Damages of ksh.20,000/= is manifestly low and has asked this Court to enhance it to ksh.170,000/=.

20) An Appellate Court will not arbitrarily or whimsically interfere with a Trial Courts’ assessment of General Damages. The Court will only interfere where the award is based on some wrong principle or is so manifestly excessive or inadequate that a wrong principle may be inferred (**Kemfro African ltd t/a Meru Express & Another – vs- Lubia & Another** (No 2) 1987] KLR 30). Straightaway, and without much ado, an award of ksh.20,000/= made in April 2012 for a fracture of the radius and ulna is manifestly inadequate. This Court will disturb with that assessment. The High Court in **Homegrown (K) Ltd –vs- Jacklim Bonaberi Otieno** [2014] e KLR upheld an award of General Damages of ksh.160,000/= made in 2007 for a fracture of the distal end of the left radius and soft tissue injuries to the left arm. I would therefore agree with the Appellants Counsel that an award of ksh.170,000/= in 2012 would be a fair and reasonable assessment for the injuries suffered by the Appellant.

21) Then there is the issue of costs. Costs of any action shall follow the event unless the Court shall for good reason otherwise order (Section 27 of The Civil Procedure Rules). The Appellant has emerged victor on Appeal. There is no good reason for me to deny her costs.

22) The outcome of the Appeal,

- a. I do hereby set aside the finding of liability made by the Lower Court on 10th April 2012 and in its place find the Respondent 100% liable.
- b. I do hereby set aside the assessment of General Damages made by the Lower Court on 10th April 2012 and in its place award General Damages of ksh.170,000/=.
- c. The Appellant shall have costs of both the suit at the Lower Court and for this Appeal.

F. TUIYOTT

J U D G E

DATED, SIGNED AND DELIVERED AT BUSIA THIS 10TH DAY OF DECEMBER 2014.

IN THE PRESENCE OF:

KADENYICOURT CLERK

WANYAMA.....FOR APPELLANT

N/A FOR RESPONDENT