REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI Civil Appeal 162 of 2002

TERESIA NJOKI MWANGI …… …… APPELLANT
Versus
ELIZABETH WANJIRU KIMANI ……..…RESPONDENT
JUDGMENT

In a suit commenced before the Principal Magistrate court in Murang'a in 1998, Elizabeth Wanjiru Kimani, "the respondent" was the plaintiff whereas Teresa Njoki Mwangi, "the appellant" was the defendant. In that suit the respondent had claimed as against the appellant special damages of Kshs. 900/=, General damages for pain, suffering and loss of amenities as well as punitive damages and interest.

The genesis of the suit was an alleged assault of the respondent by the appellant in or about 18th April, 1997. As a result of the assault, the respondent sustained deep cut wound on the right hand causing intensive bleeding as more particularized in the medical report. Following the assault, the appellant was arrested charged and convicted of the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code vide Principal Magistrate's Court at Murang'a, Criminal Case number 1041 of 1997. Upon conviction the appellant was sentenced to a fine of Kshs. 5000/=. On the basis of the foregoing the respondent as already stated initiated a suit seeking both special, General and punitive damages against the appellant.

On being served with the summon to enter appearance, the appellant duly entered appearance and filed her defence on or about 9th December, 1998. As the defence filed consisted of mere admissions of the respondent's claim, by the appellant, the respondent in good time filed an application seeking judgment on admissions. The same was canvassed before the learned magistrate and allowed. The suit was thereafter set down for assessment of damages.

During the hearing on the assessment of damages both the appellant and respondent testified. The respondent testified that on 18th April, 1997 she was cut by the appellant with a panga on the right hand behind the palm. She reported the incident to the police and the appellant was arrested charged, convicted and sentenced to pay a fine of Kshs. 5000/=. She later instructed counsel to file suit. Before then she had consulted Dr. Macharia who charged her Kshs. 800/= for the medical report that he prepared upon examining her on the nature and extent of the injuries she had sustained as a result of the assault aforesaid.

On her part , the appellant testified that she never cut the respondent. The fight was however between her children and the respondent. After the fight the respondent went and locked herself in her house only to come out and allege that she had been cut by the appellant. She was then arrested, charged, convicted and sentenced as aforesaid. She paid the fine but never lodged an appeal against the conviction and sentence.

The learned magistrate having considered the adduced evidence and the submissions by both counsel for the parties found for the respondent on both liability and quantum. Indeed liability had already been admitted by the appellant. On quantum, she proceeded to award the respondent Kshs. 120,000/= as general damages and Kshs. 800/= as special damages.

It is against this judgment and decree that the appellant has lodged this appeal. Actually the appeal is limited to quantum of damages. Two grounds of appeal are advanced in the memorandum of appeal she presented to court through Messrs J.M. Mbuthia & co. Advocates. These are:-

1. *The learned Resident Magistrate erred in both law and facts in making an award of general damages that was way out of proportion to the injuries sustained by the respondent.*

2. *The learned Resident magistrate erred in fact in (sic) law in relying on a precedent that had no relevance to the case at hand.*

The appeal came up for hearing before me on 12th October, 2009. Though served, the respondent and or her counsel failed to turn up for the hearing of the same. Being satisfied that the respondent and or her counsel had been duly served with the hearing notice going by the affidavit of service on record, I allowed the appellant to canvass the appeal, the absence of the respondent notwithstanding. Mr. Mbuthia, learned counsel for the appellant proposed to argue the appeal by way of written submissions which proposal went down well with me. Subsequently he filed the written submissions which I have carefully read and considered.

The appellant's contention is that in making the award of Kshs. 120,000/=, the trial magistrate was in error, it was so inordinately high as to amount to a wrong estimate. That the authority of Gideon Maundu Kavoi v Samson Muruki Kiilu, Machakos HCCC No. 10 of 1993 (UR) on which the trial magistrate relied in arriving at the quantum complained of had no relevance as the injuries therein were more serious. In so far as she was concerned the injuries sustained by the respondent could attract an award of no more than Kshs, 20,000/=. She relied on the authority of Loise Nyambeki Oyugi V Omar Haji Hassan NBI HCCC No. 4150 of 1991 (UR).

It is trite law that it is a very hard thing for an appellate court to interfere with the findings of fact by a trial magistrate particularly if such findings are based on the demeanour of witnesses as observed by the magistrate and his general appreciation of the evidence in the case. But if a trial magistrate has failed to appreciate the weight of bearing or circumstances admitted or proved, then an appellate court is entitled to intervene even with his findings of fact. See Peter's v Sunday Post limited (1958) E.A. 423. I discern no such misgivings in the circumstances of this case though.

It is also trite law that an appellate will not ordinarily interfere with an award of damages by the trial court unless it can be shown that in arriving at the award, the trial court acted on wrong principle(s) and as a result arrived at an award inordinately so high as to amount erroneous estimate. After all in assessing quantum of damages, the trial court is exercising some discretion. There can be no doubt however that this court has the power in its appellate jurisdiction to interfere with such discretion, but the parameters for such interference are considerably circumscribed. Sir clement De Lestang V.P in Mbogo & another v Shah (1968) E.A. 93 examined the limits of such interference thus:
"…. I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion." I have no such worries in the circumstances of this case again. The learned magistrate correctly appreciated the law as to quantum. She took into account as she ought to the medical report tendered in evidence as well as the only authority cited to her by counsel for the respondent. The appellant was also represented by counsel. However he never cited any authority that would have guided and assisted the learned magistrate in arriving at an appropriate award of damages. She cannot now be heard to complain about the authority proffered by the respondent.

The respondent suffered soft tissue injuries. It is common knowledge that such injuries attract awards between Kshs. 20,000/= and Kshs. 200,000/= depending upon their seriousness. From the medical report and the respondent's own evidence that was unchallenged on the after effects of the injuries, it cannot be said that she sustained minor soft tissue injuries as to attract a dismal sum of Kshs. 20,000/= as general damages. In my view an award of Kshs. 120,000/= was appropriate everything considered at the time.

The absence of the respondent's input in this appeal notwithstanding, I am satisfied that the award of Kshs. 120,000/- was not inordinately high as to amount to wrong and or erroneous estimate. The trial court did not act on wrong principles. Indeed the award was within the permissible range.

Finally this court cannot interfere with award merely because had it been presiding over the case, it would perhaps have arrived at a different award.

In the upshot, I find that this appeal lacks merit and is accordingly dismissed with no order as to costs since the respondent did not appear to contest the same.

Dated and delivered this 25th day of January 2010.

M.S.A. MAKHANDIA
JUDGE