



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Appeal 754 of 2002**

**BOAZ AKOKO OMOLO.....APPELLANT**  
**VERSUS**  
**JOHN OTARO ONYATA.....RESPONDENT**

*(Being an appeal from the judgment of the Senior Principal Magistrate at Milimani Commercial Courts, Nairobi in Chief Magistrate Civil Case No.2657 of 2000 by the learned Principal Magistrate Mrs. Margaret Wachira dated 5<sup>th</sup> November, 2002)*

**J U D G M E N T**

1. This appeal arises from a suit which was filed in the Chief Magistrate's Court at Nairobi by John Otaro Onyatta (hereinafter referred to as the respondent). He had sued Boaz Okoko Omolo (hereinafter referred to as the appellant though name spelt in the memo of appeal as Omoro). The respondent claimed damages from the appellant arising from injuries suffered by him as a result of assault and battery unlawfully inflicted upon him by the appellant on 22<sup>nd</sup> February, 1998.

2. The appellant filed a defence denying the respondent's claim. The appellant contended that the respondent falsely and maliciously prosecuted the same claim in a criminal court and the appellant was acquitted of the charge under Section 215 of the Criminal Procedure Code. The appellant therefore urged the court to dismiss the respondent's claim.

3. During the trial before the Principal Magistrate, three witnesses testified in support of the respondent's case. These were Dr. Jacinta Maina, the respondent and his brother Morris Otieno Onyatta and the respondent. Their evidence was briefly as follows:

4. On 22<sup>nd</sup> February, 1998 funeral arrangements in respect of one Vitalis Obongo Mbai were being held in Kariobangi. Amongst those present were the appellant, the respondent, Morris and others. An argument arose between the respondent and the appellant regarding the funeral collections. The appellant then abused and threatened the respondent, then removed an axe like object and hit the respondent on the forehead. The respondent fell down. He was taken to Kenyatta National Hospital where he was treated and discharged.

5. The matter was reported at Ruaraka Police Station. Later the respondent was examined by Dr. Jacinta Maina on 10<sup>th</sup> June, 2002. Dr. Maina prepared a medical report in which she stated that the respondent sustained a cut injury on the forehead, and had a visible scar on the forehead at the time of examination.

6. Four witnesses testified in support of the defence. These were the appellant, Shadrack Ochieng, Jane anyango Obongo and Vitalis Okal Akemo. Their evidence was briefly as follows: On the material day the appellant, the respondent and others attended a funeral meeting to arrange for the funeral of the husband of Jane Anyango Obongo. An argument arose between the appellant and the respondent. The respondent abused the appellant. The appellant therefore left the meeting and went to his house which was nearby. The respondent and his brother followed the appellant to his house and demanded that he opens the door. When the appellant did not open, the respondent's brother who was apparently armed with an axe broke the glass window. The appellant screamed and the respondent and his brother ran away. The appellant was later charged at Makadara court but was acquitted of the charge.

7. In her judgment the Principal Magistrate found that the respondent was assaulted, and that he positively identified the appellant as the person who assaulted him. The trial magistrate found that the defence witness withheld the truth and rejected their evidence as uncreditworthy. The trial magistrate found the appellant liable to the respondent and awarded the respondent general damages of Kshs.80,000/= and special damages of Kshs.2,100/=.

8. Being aggrieved by that judgment the appellant has lodged this appeal raising 5 grounds as follows:

(i) The learned principal magistrate misdirected herself in law and in fact in finding that the doctor's medical

report was proof of injuries suffered by the respondent as a result of the alleged assault.

- (ii) The learned magistrate erred in law and in fact in holding that the defence witnesses were deliberately withholding the truth.
- (iii) The learned magistrate further erred in finding the appellant liable fully or at all for the assault.
- (iv) The honourable magistrate erred in law and fact in lending unnecessary weight to the copies of documents produced by witnesses who could not be examined on the contents.
- (v) The learned magistrate also erred in law and fact in awarding a sum of Kshs.80,000 as general damages, a sum that is manifestly excessive in the circumstances.

9. During the hearing of the appeal, the respondent although duly served did not attend court for the hearing of the appeal. Hearing therefore proceeded ex-parte. Miss Omondi who appeared for the appellant submitted that the medical report which was produced by Dr. Maina and which was relied upon by the court, did not show the likely cause of the injuries. It was pointed out that the report was dated 10<sup>th</sup> June, 2002, whilst the plaint was filed earlier. It was further submitted that the card from KenyattaNationalHospital which was produced did not show any details of what the appellant was being treated for.

10. It was further submitted that the court's findings regarding the demeanour of the witness was not right as no objection was raised. The court was urged to allow the appeal and set aside the judgment of the lower court.

11. I have reconsidered and evaluated all the evidence which was adduced in the lower court. I find that it was common ground that on the material night there was an argument between the appellant and the respondent. The court was faced with two versions of what happened following the arguments. The court believed and accepted the respondent's version and not the appellant's version. I take note of the fact that the trial court had the advantage of seeing and assessing the demeanour of the witnesses. Moreover, the evidence of the defence witnesses as to what transpired was disjointed and unbelievable. I find that the trial magistrate cannot be faulted in her finding that the respondent was actually assaulted by the appellant.

12. The respondent testified that he was treated at KenyattaNationalHospital and he produced a card and P3 form both of which were consistent with his evidence. Dr. Maina who examined the respondent also confirmed that the respondent had a cut wound on the forehead. As regards the injury suffered by the respondent, although it is described as a big cut on the left forehead, there is no evidence of any stitching nor has the measurement of the resultant scar been given. The cut wound was not therefore very serious.

13. I have considered the authorities which were cited to the trial magistrate. I do note that the trial magistrate failed to take into account that the injuries in the authorities referred to involved multiple cuts and were slightly more serious than the injury suffered by the respondent herein. The trial magistrate also failed to take into account that the injuries in the cited authorities arose from road traffic accident. In the circumstances I find that the award of Kshs.80,000/= was manifestly excessive as to justify the intervention of this court. Accordingly I would reduce the award to a sum of Kshs.40,000/=.

14. I would therefore allow the appeal to the extent of setting aside the award of Kshs.80,000/= in respect of general damages and substituting thereof an award of Kshs.40,000/=. The appellant having partly succeeded in the appeal, I would award the appellant half the costs of this appeal. To this extent only has the appeal succeeded.

Dated and delivered this 16<sup>th</sup> day of April, 2010

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Ms Amondi H/B for Wasunna for the appellant

Advocate for the respondent absent

Eric - Court clerk